(1) 91-163

NO. _____

Supreme Court, U.S.
FILED
JUL 9 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1991

MATTHEW B. GOODALL, An Infant By His Father and Next Friend, Robert B. Goodall and Robert B. Goodall and Kathleen N. Goodall,

Appellants,

v.

STAFFORD COUNTY SCHOOL BOARD,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Stafford County school board's refusal to allocate Individuals with Disabilities Education Act (IDEA) funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School burden rights secured to the Goodalls under the free exercise clause of the first amendment and burden their rights as parents to direct the education and religious upbringing of their children, so that the school board must justify such refusal by a compelling state interest?

II. Will the establishment clause of the first amendment be violated if the school board allocates IDEA funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School? Conversely, does the

establishment clause prohibit the school board from selectively disobeying the IDEA to deny assistance to handicapped children attending religious schools?

III. Does the Individuals with Disabilities Education Act require the school board to allocate federal IDEA funds to provide Matthew Goodall a cued speech interpreter on the premises of Fredericksburg Christian School?

A. What does the statute say?

B. How has the Supreme Court interpreted the statutory language as applied to parentally placed private school children?

C. Has the U.S. Department of Education interpreted the act and its regulations to require the provision of services on the premises of private (even parochial) schools?

D. When does the federal act require the delivery of services on the premises of a private school?

E. How did the Fourth Circuit err in construing the federal statutes?

IV. Do Virginia statutes prohibit the use of federal IDEA funds to provide services to handicapped children in religious schools?

V. Issues on remand.

PARTIES TO THE PROCEEDING:

Matthew B. Goodall, an infant, by his father and next friend, Robert B. Goodall, Robert B. Goodall and Kathleen N. Goodall, Appellants

Stafford County School Board, Appellee

Virginia School Boards Association, Amicus Curiae

School Board of Henrico County Amicus Curiae

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STATEMENT OF THE GROUNDS OF JURISDICTION

Date of entry of the judgment sought to be reviewed. April 11, 1991.

Statutory jurisdiction of this court: 28 USC sec 1254

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution
Article VI
Amendment I

Federal Statutes

20 USC sec 241e(a), subsequently sec 241e-1

20 USC sec 1401 (a)(16)

20 USC sec 1413 (a)(4)(A)

20 USC sec 1413 (a)(4)(B)

20 USC sec 1413 (a)(9)

20 USC sec 1415 (E)(2)

42 USC sec 1983

Federal Regulations

34 CFR sec 300.400-403

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34 CFR sec 76.1(a)

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34 CFR sec 76.650 - 76.662

45 CFR sec 116.19

Virginia Constitution Article 8, sec 10

Virginia Statutes

Section 22.1-216

Section 22.1-218(A)

Section 22.1-219

Section 22.1-220

The pertinent text of each provision is contained in the Appendix to this Petition [see separate volume].

STATEMENT OF THE CASE

Matthew Goodall's parents requested that the Stafford County school board provide special education and related services for their deaf son Matthew for the 1988-89 and subsequent school years. In a draft Individualized Education Program (IEP), the school board proposed to provide Matthew a full-time cued speech interpreter at Drew Middle School, a Stafford County public school. The Goodalls requested that the location of that service be Fredericksburg Christian school (FCS). The County

would not agree on the location of service. Accordingly, the Goodalls requested a due process hearing. The state hearing officer concluded that Stafford County should not be required to furnish an interpreter at Matthew's private Christian school. The Goodalls appealed the decision. The state review officer affirmed the hearing officer's decision on the basis that the school board's furnishing Matthew Goodall a cued speech interpreter at his private Christian School would violate the establishment clause of the United States Constitution.

The Goodalls then filed a complaint in the United States District Court for the Eastern District of Virginia. The District Judge granted summary judgment to Stafford County, stating that he was

not ruling on constitutional grounds, but rather on the basis that Virginia statutes or regulations did not allow Stafford County to pay for special education and related services for Matthew at an unaccredited private school.

The Goodalls appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the District Court decision holding:

a. Virginia's constitution and statutes consistently express the policy of funding special education only in non-sectarian schools.

b. By offering Matthew Goodall the services of a cued speech interpreter at Drew Middle School the County is in full compliance with the requirements of the IDEA and its regulations.

c. The County's denial of a publicly funded cued speech interpreter for Matthew Goodall at Fredericksburg Christian School burdens the Goodalls' sincerely held religious beliefs, must be subjected to strict judicial scrutiny, and would violate the free exercise clause of the first amendment unless it could be justified by a compelling state interest.

d. The County's refusal to provide an interpreter to Matthew Goodall at FCS is justified by the compelling interest of not violating the establishment clause.

MATERIAL FACTS

1. Matthew Goodall has been a resident of Stafford County since his birth. He became deaf after an attack

of meningitis at age 3 1/2. Shortly thereafter he began a preschool class using cued speech. (App 2)

2. Cued speech is a visual representation of spoken language. It is a phonetic system which enables a deaf person to distinguish visually every sound spoken to him. (App 2)

3. A cued speech interpreter is not a teacher. He or she is simply the "ears" of the hearing impaired child. The interpreter does not affect the content of speech. In fact, a machine sometimes called an "autocuer" is being developed which may eventually take the place of the human interpreters. (App 5)

4. An interpreter is a service to the individual handicapped child and not to the school that the child attends.

5. Matthew entered 6th grade at Fredericksburg Christian School (FCS), a private sectarian (Christian) school in the 1988-89 school year. FCS has never provided a cued speech interpreter to any student. Matthew's parents have borne the burden of providing interpreters: his mother Kathy Goodall has interpreted for him, and the Goodalls have employed interpreters. (App 6)

6. Matthew would attend FCS if he were not handicapped (deaf).

7. Matthew is successfully mainstreamed full time with hearing students at FCS. To be successfully mainstreamed, he requires the special education and related service of a full time, fluent cuing interpreter in his regular classroom. (App 8)

8. A full time interpreter for Matthew would necessarily be one on one. Stafford County has no other hearing impaired student in Matthew's grade using cued speech. (App 7)

9. Stafford County furnishes a full time, one-on-one, fluent, cued speech interpreter to other deaf children attending its public schools. (App 4)

10. It would cost no more to furnish Matthew a full time, fluent, cuing interpreter at FCS than to do so at Drew Middle School.

11. The Plaintiffs, Robert B. Goodall and Kathleen N. Goodall, hold a sincere Bible-based religious conviction that they are to provide their children

with a Christian education and to educate their children in Christian schools at this time.

BASIS OF FEDERAL JURISDICTION

> The Court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the Court determines is appropriate. 20 USC sec 1415 (E) (2).

ARGUMENT

I. Does the Stafford County school board's refusal to allocate federal IDEA funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School burden rights secured to the Goodalls under the free exercise clause of the first amendment and burden their rights as parents to direct the education and religious upbringing of

their children, so that the school board must justify such refusal by a compelling state interest?

The Fourth Circuit held that the Goodalls' free exercise rights were burdened, citing Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981):

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. 450 U.S. at 717-18.

It held that this "infringement" would be subject to strict scrutiny and would require a compelling state interest to justify it. The holding is based on the unemployment compensation cases[1] alone. The Supreme Court has refined the analysis of those cases. In Bowen v. Roy, 476 US 693 (1986) the Court held that when a statute allows an individual hearing; and the applicant shows that he acted or refused to act because of sincerely held religious beliefs; then he cannot be denied the

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1. Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm., 480 U.S. 136 (1987); Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963) were cited by the Fourth Circuit. Goodall by Goodall v. Stafford County School Board, 930 F2d 363, 369 4th Cir (1991).

benefit of the statute. The IDEA does provide an individual hearing on the point in issue in this case, location of service. 34 CFR sec 300.403(b).[2] On that point (location of service) it is undisputed that the Goodalls placed Matthew Goodall at FCS based on their sincerely held religious conviction. Accordingly, the Bowen court would find that Matthew Goodall could not be denied the benefit of the statute absent a compelling state interest.

In Employment Division v. Smith, 494 U.S. ___, 108 LE 2d 876, 110 S Ct ____ (1990) the Court held that when free exercise rights are coupled with the constitutionally protected rights of

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2. See comment to 34 CFR sec 300.552: "the overriding rule in this section is that placement decisions must be made on an individual basis".

parents to direct the education and religious upbringing of their children, a compelling state interest is required to sustain legislation which burdens those rights.

Matthew Goodall's case presents all three of these constitutional rights: free exercise, the right of parents to direct the education of their children, and the right of parents to direct the religious upbringing of their children. Therefore, the Employment Division Court would find that Matthew Goodall could not be denied the benefit of the IDEA without a compelling state interest.

In the unemployment compensation cases the application of the statute alone would reach a negative result: the applicant would be denied the benefit. In each of those cases however, the

Supreme Court held that the free exercise clause required the benefit to be conferred. Similarly, in Employment Division v. Smith the application of the neutral, generally applicable statute alone would reach a negative result: the appellant's use of peyote would be made criminal without exception. Yet the court held that if the constitutionally protected rights of parents, which are present in Matthew Goodall's case, had been coupled with free exercise rights, then the state would have been required to make an exception or show a compelling state interest not to do so.

Therefore, even if the proper interpretation of the IDEA in Matthew Goodall's case would not require the benefit, an exception would have to be

made and the benefit must be conferred unless there is a compelling state interest not to do so.

However the proper interpretation of the IDEA in fact requires that the benefit be conferred (see part III of this petition beginning at page 33). In other words, the school board's reliance on the establishment clause is not to justify obedience to a neutral, generally applicable law which would deny a benefit, but rather to justify its disobedience to a neutral, generally applicable law that requires a benefit.

The heart of this case, and the central error in the Fourth Circuit's analysis of it, is that the school board pretends to be a legislature which can refuse to fund some constitutionally protected activities without violating

the constitution. This is simply not true. Congress is the legislature; the school board is an administrator. Congress' legislation does not draw a religious/secular line between those who will benefit and those who will not. Therefore, the school board's decision to selectively disobey the statute and to withhold its benefit only from those practicing their constitutionally protected rights is not the prerogative of a legislature, but the religious discrimination of an administrator.

The Fourth Circuit said the school board's "infringement" on the Goodalls' first amendment rights must be subjected to strict scrutiny. Yet the opinion has no strict scrutiny analysis: the court does not cite statutory language which would deny the benefit and then consider

whether such language could be more narrowly drawn to effect a compelling state interest without offending the constitutionally protected rights. It cites no such statutory language, because it starts from the wrong point: the school board's conduct rather than Congress' legislation.

CONCLUSION: The Goodalls' constitutionally protected free exercise rights and rights of parents to direct the education and religious upbringing of their children are burdened when they are forced to choose between the important government benefit of educational assistance for their handicapped child and exercising those constitutionally protected rights. Any

statute which poses that choice must promote a compelling state interest and must be as narrowly drawn as possible.

II. Will the establishment clause of the first amendment be violated if the school board allocates IDEA funds to furnish Matthew Goodall a cued speech interpreter at Fredericksburg Christian School? Conversely, does the establishment clause prohibit the school board from selectively disobeying the IDEA to deny assistance to handicapped children attending religious schools?

By granting certiorari the Court can address a nationwide problem: many local school boards and courts believe that "separation of church and state" justifies religious discrimination: denying the benefit of religiously

neutral social welfare legislation only to people practicing their religious beliefs.

The Fourth Circuit misstated the holding of Lemon v. Kurtzman, 403 US 602 (1971) and thereby reached the wrong conclusion. It stated:

> The seminal Establishment Clause case is Lemon v. Kurtzman, 403 US 602 (1971), in which the Supreme Court has set forth a three-part test to determine whether government action impermissibly establishes, sponsors, or results in active involvement in religious activity. Such action violates the constitution if any one of the of the following prongs is not satisfied:
> 1. the government action must have a secular purpose;
> 2. the action must not have the primary effect of advancing religion; and
> 3. the action must not create excessive entanglement between church and state. (emphasis added) Goodall, supra 930 F 2d at 370. (Emphasis added)

In fact Lemon states:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster "an excessive government entanglement with religion". Lemon, 403 US at 612 (emphasis added)

The error is obvious: Lemon v. Kurtzman held that it is a statute that is being analyzed against the establishment clause, not government action, and not the impact of the statute in an isolated case.

The Fourth Circuit made the same mistake the Washington Supreme Court made in Witters v. Washington Department of Services for the Blind, 474 US 481 (1986). Mr. Justice Powell addressed this error as follows:

> The Washington Supreme Court reached a different conclusion [that the Washington statute violated the federal constitution's establishment clause] because it found that the

> program had the practical effect of aiding religion in this particular case . . . In effect, the court analyzed the case as if the Washington Legislature had passed a private bill that awarded petitioner free tuition to pursue religious studies.
>
> Such an analysis conflicts with both common sense and established precedent. Nowhere in Mueller did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather we looked to the nature and consequences of the program viewed as a whole . . . This is the appropriate perspective for this case as well. Witters, 474 US at 492.

The Fourth Circuit erred because it analyzed this case as if Congress had passed a private bill that awarded Matthew Goodall funds to employ an interpreter at a religious school.

Because the Fourth Circuit began from the wrong point: the school board's conduct rather than Congress' legislation, it never attempted to apply

Lemon's analysis to the IDEA. Its opinion never discusses whether the legislation has a secular purpose; whether the legislation's principal or primary effect neither advances nor inhibits religion; and whether the statue fosters an excessive government entanglement with religion.

In contrast, the Supreme Court in Witters examined the Washington statute and listed 9 reasons the Washington statute did not offend the first amendment's establishment clause:

> . . . vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is "made available generally without regard to the sectarian-nonsectarian, or

> public-non-public nature of the institution benefited. . . and is in no way skewed towards religion. It is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court" . . . it creates no financial incentive for students to undertake sectarian education. . . it does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend [the] aid on wholly secular education, and as a practical matter have rather greater prospects to do so. . . in this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the state. Witters, 474 US 481 at 487-489.

The IDEA as a statutory scheme is virtually identical to Washington's statute, and the facts of Matthew Goodall's case are virtually identical to those in Witters. Indeed, Matthew's case is stronger because:

a. An interpreter would benefit Matthew personally, but would not benefit his Christian school even indirectly; while the aid in Witters paid (indirectly) tuition to his school; and

b. IDEA is a federal statute. It may be presumed that Congress had at least as high a regard for the first amendment's religion clauses as the Washington legislature.

The Fourth Circuit also erred in dismissing Witters as inapposite. It stated:

> Witters is the last of a line of cases in which the Supreme Court has upheld tax deductions taken by and tuition reimbursements to students at religious institutions. [citations omitted] As such, the decision has little application to the instant case. In each of those cases, the Court was confident that there existed an "effective means for insuring that the cash

> reimbursements would cover only secular services." Goodall, supra 930 F 2d at 371.

No one reading Witters could conclude that there was any effective means for insuring that the tuition assistance to Mr. Witters would cover only secular services. Mr. Justice Marshall stated:

> The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer. Witters, 474 US at 487. (emphasis added)

and concluded:

> Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. Witters, 474 US at 488, 489. (emphasis added)

The Supreme Court's establishment clause education cases have divided the statutes which the Court has upheld and struck down in five ways:

1. If the aid is to the school, then the statute is struck down. Grand Rapids School District v. Ball, 473 US 373 (1975). If the aid was directly to students or their parents, then the statute was upheld: Everson v. Board of Education, 330 US 1 (1946) (transportation of all children).

The IDEA is like the statutes which were upheld: IDEA assistance is the handicapped children, not to schools.

2. Secular aid to parochial schools will be struck down if it is massive or substantial. It amounts to a state subsidy of parochial schools by

relieving them of their duty to provide academic instruction. Aguilar v. Felton, 473 US 402 (1985).

No one contends that the IDEA massively provides aid to sectarian schools. Nor will Fredericksburg Christian School be relieved of any burden if the Stafford school board begins furnishing Matthew Goodall a cued speech interpreter. The private school does not bear that burden now.

3. If the aid was teachers, then the statute was struck down; but statutes providing other aid were upheld. Wolman v. Walter, 433 US 229 (1977) (upholding statutory provisions allowing public personnel to provide speech, hearing and psychological diagnostic services on parochial school premises).

IN MATTHEW GOODALL'S CASE IT IS STIPULATED THAT INTERPRETERS ARE NOT TEACHERS AND DO NOT AFFECT THE CONTENT OF SPEECH. (App p 5)

4. If the aid recipients were all members of a religious group, then the statute was struck down. Lemon v. Kurtzman, 403 US 602 (1971). (Two hundred and fifty teachers at Roman Catholic schools were the only beneficiaries of the act). If the aid was for all students, religious or secular, then the statute was upheld. Witters and Everson, supra; Mueller v. Allen, 463 US 388 (1983) (upholding Minnesota statute allowing state taxpayers to deduct educational expenses of their children).

No one contends that the recipients of IDEA assistance are all members of a religious group.

5. All of the statutes that were struck down were state law schemes. In contrast, the IDEA is a federal statute, and this Court has given deference to Congress' sensitivity to first amendment values in its educational assistance legislation. Tilton v. Richardson, 403 US 672 (1971).

On each of these five factors the IDEA is like the statutes which the Supreme Court has upheld; and it is unlike the statutes which were struck down.

Not only does the establishment clause not support the school board's position, but it also protects the Goodalls from the board's religious

discrimination. In each of the cases just cited a statute was upheld or struck down. In no case was an administrator permitted to selectively disobey a religiously neutral, generally applicable statute to give different and inferior treatment only to persons practicing sincerely held religious beliefs.

In Allegheny County v. Pittsburgh ACLU, 492 US ____, 106 L Ed 2d 472, 109 S Ct ____ (1989), the Court stated the establishment clause principle that government may effect no favoritism among sects or between religion and non-religion.

The IDEA is religiously neutral. It doesn't advance or inhibit religion. But when the school board refuses to spend IDEA funds to benefit children in

sectarian schools, then government has effected a favoritism of non-religion over religion and conveyed a message of government's disapproval of religion in violation of the establishment clause.[3]

The chilling effect on protected freedoms is government hostility, not neutrality, toward religion.

This Court stated in Bowen v. Roy:

> Thomas and Sherbert may be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect. Bowen, 476 US at 708.

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3. The school board's action also violates the fourteenth amendment of federal constitution: it is state action which abridges a privilege of a citizen of the United States (Matthew Goodall in receiving federal IDEA funds which are for all handicapped children); and it violates the Civil Rights Act, 42 USC sec 1983: under color of law the board has deprived the Goodalls of rights and privileges secured by the Constitution and federal laws.

The establishment clause is violated when the school board affords handicapped children attending religious schools unequal and inferior treatment.

III. Does the Individuals with Disabilities Education Act require the school board to allocate federal IDEA funds to provide Matthew Goodall a cued speech interpreter on the premises of Fredericksburg Christian School?

By granting certiorari the Court can address two nationwide concerns: first, the Department of Education has consistently stated that Aguilar v. Felton, does not apply to the IDEA, yet some decisions of courts and school boards are made as if it did; second, local school boards will always be tempted to allocate IDEA funds to

themselves to the exclusion of private school children; and few handicapped children or their parents will have the resources to defend against systematic violation of the EDGAR regulations which require benefits to be afforded such children.

A. What does the statute say?

The IDEA provides federal funds which are distributed through local public school boards to provide special education and related services for handicapped children whether or not they attend public school.

The extension of the act's benefit to private school children is addressed in the statute itself, 20 USC sec 1400 et seq, in the IDEA regulations, 34 CFR sec 300.400-403,450-452, and in the

education department general administrative (EDGAR) regulations, 34 CFR sec 76.651-76.663.

The act distinguishes two groups of private school children. For those placed by the public school system (because it is unable to meet their needs in the public system):

a) each child is entitled to special education and related services;

b) his entire educational expense is paid by the public system; and

c) the portion of the private school's program under which he receives services must meet state standards.

In contrast, for parentally placed private school children:

a) each child does not have an individual right to services. Rather the selection procedure is governed by the regulations.[4]

b) the public doesn't pay for the child's education at the private school but only his special education;

c) the private school need not meet state standards.

B. How has the Supreme Court interpreted the statutory language as applied to parentally placed private school children?

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4. Under that procedure Matthew Goodall must be selected, because Stafford provides one-on-one fluent cued speech interpreters to deaf children attending its public schools and has stipulated that that is the appropriate service for him. He has in fact been selected to receive services. The dispute is over the proper location of services.

The Supreme Court has at least once before addressed this issue. In Wheeler v. Barrera, 417 US 402 (1974) parents of parochial school students in Kansas City, Missouri brought a class action against the public school system alleging that the school system had received Title I, 20 USC sec 241e-1 (remedial education) money and spent it to provide materials, equipment and remedial education teachers in the public schools, and to provide materials and equipment but not remedial education teachers in the private schools; and that was not a comparable benefit as required by the regulations. They showed that the school system spent about 1/3 as much money per pupil on the private parochial school children as it did on the public school children.

Although it construes another statute, Wheeler v. Barrera, should be followed in construing the IDEA, because:

(1) the language of Title I, its regulations (45 CFR sec 116.19), a Department of Education handbook concerning the extension of its benefit to private school children, and the Supreme Court's language in Wheeler v. Barrera are now essentially mirrored by the IDEA, its regulations, and the EDGAR regulations;

(2) both Title I and the IDEA provide federal educational funding for children in both public and private schools;

(3) the legislative aim of both acts is to assist children rather than schools:

> The term "special education" means specifically designed instruction at no cost to parents or guardians to meet the unique needs of a child with a disability . . ." 20 USC sec 1401(a)(16);
>
> (4) Because each
>
> act was designed to be administered by local public education officials, a number of problems naturally arise in delivery of services to eligible private school pupils. Wheeler v. Barrera, 417 US at 406;[5] and

(5) both Acts contemplate and allow the use of public personnel on the private school premises.[6]

---

5. The Goodalls believe, but have been prohibited from proving in the absence of a trial, that the Stafford County school board has never spent IDEA funds on children enrolled by their parents in any private schools, secular or religious.

6. The Wheeler Court wisely left for a later day establishment clause concerns if the school board chose to put public personnel in the private schools. When that later case came, the court decided that remedial education teachers on private school premises would violate the establishment clause, Aguilar v. Felton, 473 US 402 (1985); but that

The Wheeler Court held that Kansas City's allocation of federal funds was not comparable. It remanded the case to allow the school board to fashion a comparable benefit for parochial school students. The court specifically stated

> providing nothing to fill the gap, however, is not among the acceptable alternatives. Wheeler v. Barrera, 417 US at 425.

The Fourth Circuit held that the school board satisfies its obligation under the IDEA to provide special education to parochial school students by offering services at a public school site. It cited the "genuine opportunity

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other non-teacher public school personnel on the premises of private schools would not offend the establishment clause, Wolman v. Walter, 433 US 229 (1977). In Matthew Goodall's case it is stipulated that a cued speech interpreter is not a teacher and does not affect the content of speech. (App 5)

for equitable participation" language of 34 CFR sec 76.651 and the limited methods of delivering services set out in Virginia regulations. Virtually identical language was in Title I, and the opportunity to attend public school to receive Title I benefits was available to the parochial school students in Wheeler v. Barrera. Yet the Supreme Court implicitly rejected the argument that an offer of services at the public school site would comply with the statute, calling it "providing nothing".

Matthew Goodall's case under the IDEA is even stronger than that of the parochial school children in Wheeler v. Barrera for two reasons:

1. Title I required only a comparable benefit for private school children in general. The Supreme Court did not want to become a school board determining what form that comparable benefit should take. In contrast, while the IDEA includes "comparable benefit" language, it also requires the appropriate special education service for each handicapped child Board of Education v. Rowley, 458 US 176 (1982). It is stipulated that the appropriate special education service for Matthew Goodall is a full time cued speech interpreter. (App 7)

2. No free exercise claim was made by the parents in Wheeler v. Barrera. They won on the language of the statute

and regulations alone, that a comparable educational benefit had not been distributed to their children.

C. Has the U.S. Department of Education interpreted the act and its regulations to require the provision of services on the premises of private (even parochial) schools?

Secretary of Education William J. Bennett wrote to each chief state school officer to provide clarification on the implications of Aguilar v. Felton, 473 US 402 (1985):

> Likewise, the Felton decision need not have the effect of prohibiting on-premises services to private school children in all other Federal programs. With respect to programs under the Bilingual Education Act and the Education of the Handicapped Act, for example, a prohibition of on-premises instructional services may make it impossible to provide the instructional services required by the statutes in question. The special problems and statutory schemes for these programs were not

before the Supreme Court when it decided Felton. New, 1985 EHLR 211:372

In Aschenbrenner 1979 EHLR 211:110

the Department stated:

> Can P.L. 94-142 services be rendered to handicapped nonpublic school children on the premises of the nonpublic school?
>
> Comment: Since P.L. 94-142 is a federal program, it would appear that the services can be provided on the premises of the nonpublic school. Such an "on-premises" program would be parallel to the ESEA Title I program, which provides on-premises services for eligible non-public school children.

More recently, in Orschel, 16 EHLR 1368 (1990) the Department stated:

> The Department continues to hold the position stated by former Secretary Bennett regarding the Felton decision's effect on the constitutionality of on-premises services at private sectarian schools under IDEA.
>
> Former Secretary Bennett's letter does not address the issue of when Federal statutory and regulatory provisions would require a school district to provide on-premises

> services to students with disabilities voluntarily enrolled by their parents in a private school. The criteria for making that determination are set forth in Department regulations governing the provision of services by school districts to such students under various federally-funded education programs, including the IDEA. Whether a school district, in meeting these requirements, would have to provide on-premises services for children with disabilities enrolled by their parents in private schools depends on the particular circumstances which are present.

D. When does the federal act require the delivery of services on the premises of a private school?

There are five factors that determine when services must be provided on the premises of the private school (whether secular or not). They are:

1. The nature of the handicap and the service required to meet it. Anthony Wayne Local School District, 16 EHLR 1032 (1990) (school district

required to provide services for deaf children on premises of private, Lutheran school);[7] It is a stipulated fact that Matthew Goodall needs an interpreter full time in his regular classroom to be successfully mainstreamed. (App 8) Accordingly, cued speech interpretation is required to be given there.

---

7. Accord, Case No. SE 85444 Los Altos School District, 1985-86 EHLL DEC 507:327 (1985) (a special education teacher for the visually handicapped was required to be furnished on the premises of a blind child's private school, because she could not benefit from her regular education program at the private school if her special education was provided at a public school site); In the Matter of the City of New York, 1984-85 EHLR DEC 506:309 (toileting assistance and handwriting assistance were required to be given on the premises of the non-public sectarian school attended by a wheelchair-bound child with cerebral palsy).

2. Cost. 34 CFR Section 76.655 requires the school board to spend the same average amount of program funds on a student enrolled in a private school who receives benefits under the program as it does on a student enrolled in a public school who receives benefits under the program. It is stipulated that the appropriate service for Matthew Goodall is one full time cued speech interpreter who would necessarily be one-on-one, because Stafford has no other deaf child in Matthew's grade using cued speech. (App 7) Therefore, it would cost no more to provide Matthew the interpreter at Fredericksburg Christian School than in one of Stafford County's public schools.

3. Least restrictive environment. The IDEA requires that a handicapped child be "educated in the school which he or she would attend if not handicapped". 34 CFR sec 300.552. Fredericksburg Christian School is the school Matthew would attend if he were not deaf. Therefore, special education must be provided to him there. Aschenbrenner, 1979 EHLR 211:110.

4. The rights of parents to direct the education and the religious upbringing of their children.

5. Free exercise. In Weithers, 1979 EHLR 211:108 (1979) the U.S. Department of Education stated:

> An LEA may not require a parochial school student to enroll in the public schools as a condition to receive benefits for services funded with federal dollars for the education of handicapped children...

In Matthew Goodall's case all five factors are present which would require the school board to furnish an interpreter on the premises of Fredericksburg Christian School.

E. How did the Fourth Circuit err in construing the federal statute?

1. First, the court never cited or distinguished Wheeler v. Barrera which construed virtually identical language in Title I of the Elementary and Secondary Education Act.

2. The court misinterprets the word "program". The "program assisted or carried out under this subchapter" is the entire extension of educational assistance to handicapped children in the state,

whether the children are in public schools or private schools. Moore, 16 EHLR 222 (1989); 34 CFR sec 76.1(a). The court wants to narrow the meaning of "program" to mean "a program at a public school site". There is utterly no authority in the act for this interpretation which completely changes the meaning of:

> provision is made for the participation of [private school] children in the program assisted or carried out under the subchapter by providing for such children special education and related services. 20 USC sec 1413 (a)(4)(A).

3. The court interprets "providing for such children special education and related services" in the same section to mean "offer them the opportunity to receive benefits at a public school site". Again, there is no authority for this interpretation in the act, and it

is directly contrary to the Supreme Court's holding in Wheeler v. Barrera under the virtually identical language of the remedial education act.

4. The Fourth Circuit said there is a "wealth of authority" that no benefits under the act would be provided on the premises of private schools. The Court cites McNair v. Cardimone, 676 F Supp 1361 (SD Ohio 1987). The rationale of the District Court in that case was rejected on appeal. McNair v. Oak Hill Local School District, 872 F 2d 153, 156 (6th Cir 1989). The District Court confused "education" with "special education", concluding that no child in any private school was entitled to benefits under the act, in complete disregard of the requirements of the act 20 USC sec 1413(a)(4)(A), its

regulations 34 CFR sec 300.403, 450-452 and the EDGAR regulations, 34 CFR sec 76.650-76.663 which govern the participation of private school children in federal education programs.

The court cited Work v. McKenzie, 661 F Supp 225, 229 (DDC 1987). The Fourth Circuit summarized the holding in Work v. McKenzie as follows:

> When public agency provides free appropriate public education, and parents choose to place child in private school nevertheless, public agency is not required to pay for the child's education at the private school". Goodall supra, 930 F 2d at 367.

This suggests a misunderstanding of the IDEA and the facts of this case. No one has asked Stafford County to pay for Matthew Goodall's education at Fredericksburg Christian School. Rather, Stafford County is asked only to

provide him special education and related services as the act and its regulations require. 34 CFR secs 300.403, 450-452.

The court cites Barnett v. Fairfax County School Board, 927 F 2d 146 (1991). Barnett made no free exercise claim; and after hearing on the merits a hearing officer concluded that there were economies for having all Fairfax County high school cued speech users in one school. The Goodalls have asserted from the beginning that there are no such economies in Matthew Goodall's case; and no hearing on the merits has been held to dispute that claim.

The Fourth Circuit cites the Department of Education's response to Robert Goodall's inquiry concerning a "bypass". The department's letter does

not support the Court's conclusion. The letter says essentially that a bypass is not the appropriate remedy for an individual violation of the IDEA by a local school board. The department's letter doesn't discuss the facts of the Goodalls' case in particular. Instead it states in general:

> Whether an LEA would have to provide on-site services to meet the 'equitable participation' requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services. Goodall, 16 EHLR 1398 (1990)[8]

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8. That the Department of Education's position is that the IDEA sometimes requires services to be delivered on the premises of private sectarian schools is made plain in Orschel, 16 EHLR 1368 (1990).

As discussed at pages 45-49, the specific facts of Matthew Goodall's case require that the appropriate service for him, a cued speech interpreter, must be provided on the premises of his private school.

Finally the Fourth Circuit cites 34 CFR sec 76.532 which prohibits states or subgrantees from using grants to pay for religious worship, instruction or proselytization. This confuses "education" with "special education". If the Goodalls prevail, the school board will not pay for Matthew Goodall's education or instruction at FCS. It will pay for an interpreter who is not a teacher and does not affect the content of speech. To paraphrase the Court in Witters, any religious instruction Matthew gets is a result of the

genuinely independent and private choice of the aid recipients and not a result of state action; and that private choice is protected by the first amendment's free exercise clause and by the fundamental right of parents to direct the education and religious upbringing of their children.

CONCLUSION: The IDEA requires the Stafford school board to furnish Matthew Goodall a cued speech interpreter on the premises of Fredericksburg Christian School.

IV. Do Virginia statutes prohibit the use of federal IDEA funds to provide services to handicapped children in religious schools?

The Fourth Circuit committed the following errors:

1. It correctly held that the burden on the Goodalls' free exercise and parental rights requires a compelling state interest and strict scrutiny, but it completely failed to apply a "strict scrutiny" analysis to the Virginia statutes to see if they could be more narrowly drawn to advance a compelling state interest without offending the Goodalls' protected rights.

2. The court notes in footnote 1 of its opinion that Fredericksburg Christian School is not on the list of private schools approved by the Virginia Department of Education to provide special education and related services under the IDEA. This suggests a misunderstanding of the IDEA. Many public schools systems are not able to

provide services for some handicapped children. The IDEA therefore allows the public school system to place such children in private schools to meet the requirement of the act to provide services to them. 20 USC sec 1413(a)(4)B. Such private schools, which contract with public schools to provide such services, must be approved by the State Department of Education. Only the portion of a private school program providing special education to a publicly placed handicapped child must be state approved. Reedy, 16 EHLR 1364 (1989). Because the Goodalls are not asking the county school board to contract with the Christian school, because the Christian school does not provide the interpreter, and because

Matthew is placed there by his parents, Fredericksburg Christian School need not be state approved.

3. The court points out that children in custody of state boards or agencies can't be placed in sectarian schools. Matthew Goodall is not in the custody of a state board or agency. He is in the custody of his parents, and this Court recently reaffirmed the fundamental right of parents to direct the education of their children and the religious upbringing of their children in Employment Division v. Smith, 494 US _____ (1990).

4. The court cites article 8 section 10 of the Virginia Constitution which prohibits appropriations to

sectarian schools. The IDEA provides no assistance to any school. It provides assistance directly to children.

5. The court claims that Virginia's constitution and statutes express a policy of funding special education only in nonsectarian schools. However Virginia Code sec 22.1-219 states:

> Nothing in this article shall be construed to restrict or prohibit the use of any federal, state or local funds made available under any federal, state or local appropriation or grant.

6. The court never quotes or analyzes the three Virginia statutes which it claims support the county's position.

In fact, Code of Virginia sec 22.1-216 only prohibits the school board from contracting with Fredericksburg Christian School to

furnish Matthew Goodall an interpreter. No one has asked the school board to do so.

Code of Virginia sec 22.1-218 deals with the circumstance in which the public school is placing a handicapped child in a private school, because it is unable to provide the appropriate services in the public schools. It has nothing to do with the facts of Matthew Goodall's case in which the public school is able to provide to appropriate service, but the parents choose to place the child in a private school. See 34 CFR sec 300.403, 300.450-452.

Code of Virginia sec 22.1-220 deals only with county funds, not federal funds. IDEA funds are federal funds. 20 USC sec 1413(a)(9).

7. The court errs in concluding that the school board may require a private school to meet state standards if a parent has placed his child there. This one error has two parts:

a. The court cites no authority for this in the IDEA. The US Department of Education disagrees with the court:

> [IDEA] affects only those portions of the private schools' operation that affect publicly-placed students, and not the operation of the private school or facility as a whole. Reedy, 16 EHLR 1364 (1989).

b. The school board may not use "state standards", as a device to prohibit children from attending religious schools. Pierce v. Society of Sisters, 268 US 510 (1952); Wisconsin v. Yoder, 406 US 205 (1972).

8. IDEA is federal legislation. Its extension of educational assistance to all handicapped children has supremacy over any Virginia command that no federal benefit may be given to some of Congress' intended beneficiaries. U.S. Constitution, article 6.

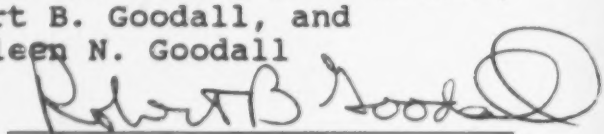
CONCLUSION:

Properly interpreted, Virginia statutes do not prohibit the use of federal IDEA funds to provide educational assistance for handicapped children attending private religious schools. If the proper interpretation of the statutes did prohibit such use, then the Virginia statutes must be struck down: there is simply no compelling state interest in prohibiting the education of handicapped children in religious schools or in prohibiting such

children from sharing in the benefit of a religiously neutral federal program to assist the education of handicapped children.

V. Issues on remand. Should the petitioners prevail, on remand the school board should be required to furnish Matthew Goodall a cued speech interpreter prospectively; Matthew's IEP should specify that the interpreter should be competent to cue anything the classroom teacher says, Ventura (CA) Unified School District, 16 EHLR 251 (1989); the Goodalls should be compensated for their expenses and the value of their time in interpreting for Matthew; and attorney's fees should be awarded the Goodalls. Burlington School Comm. v. Massachusetts Department of Education, 471 US 359, (1985).

MATTHEW B. GOODALL, an infant
by his father and next friend,
Robert B. Goodall, and
Kathleen N. Goodall

By: 
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91-163

NO.

Supreme Court, U.S.
FILED
JUL 9 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1991

MATTHEW B. GOODALL, An Infant By His Father and Next Friend, Robert B. Goodall and Robert B. Goodall and Kathleen N. Goodall,

Petitioners

v.

STAFFORD COUNTY SCHOOL BOARD,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CORRECTED APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Matthew B. GOODALL, an infant by his father and next friend, Robert B. GOODALL; Robert B. Goodall; Kathleen N. Goodall, Plaintiffs-Appellants,

v.

STAFFORD COUNTY SCHOOL BOARD, Defendant-Appellee.

No. 90-1014

United States Court of Appeals, Fourth Circuit.

Argued Jan. 10, 1991.
Decided April 11, 1991.

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and YOUNG, Senior U.S. District Judge for the District of Maryland, sitting by designation.

MURNAGHAN, Circuit Judge:

Matthew B. Goodall, an infant by his father and next friend (and counsel) Robert B. Goodall, Robert B. Goodall and Matthew's mother, Kathleen N. Goodall

(collectively the Goodalls), brought an action in the United States District court for the Eastern District of Virginia, Alexandria Division, seeking an order directing appellee School Board of Stafford County, Virginia to provide Matthew, who is deaf, with a cued speech interpreter at Fredericksburg Christian School. The Goodalls also sought reimbursement for costs incurred in providing such an interpreter themselves. On cross-motions for summary judgment, the district court entered judgment in favor of the County, and the Goodalls have appealed.

Matthew Goodall is a minor and has been a resident of Stafford County since his birth. He became profoundly hearing impaired after an attack of meningitis

at age 3 1/2. Shortly thereafter, he was identified as a handicapped child for whom special education services were appropriate.

In 1980, 1981 and 1983, Individualized Educational Plans (IEPs) were prepared for Matthew, with the consultation and concurrence of Matthew's parents, calling for special education and related services to be provided at Spotswood Elementary School, a public school. Matthew attended preschool class in the regional special education program at Spotswood Elementary School along with several other deaf children who were about his age. Matthew continued to participate in the program through the first grade.

In 1984, Matthew's parents voluntarily placed Matthew at The Word of Life School, a private religious school in Fredericksburg, Virginia, which he attended through the fourth grade. In 1986, they voluntarily placed Matthew in the Stafford Christian School, a private religious school in Stafford, for the fifth and sixth grades.

In 1988, Matthew's parents decided that he should attend Fredericksburg Christian School, a private religious school, to further his religious education and development. Fredericksburg Christian School is a sectarian, religious school, in which Christian teachings are woven into the curriculum together with non-religious

subjects. The curriculum includes Biblical education and spoken prayer as one of the daily activities. Matthew receives no special education at Fredericksburg Christian School.

In the summer of 1988, the Goodalls requested that the public schools of Stafford County again provide special education services to Matthew. An IEP meeting was held in September of 1988. The Goodalls participated in the meeting and a draft IEP was prepared. The draft IEP indicated that hearing-related services were still appropriate for Matthew and proposed to provide those services at the Drew Middle School, a Stafford County public school.

Matthew's parents objected to Matthew's receiving interpretive services at Drew Middle School and asked the County to provide a full-time cued speech interpreter at Fredericksburg Christian School. The Goodalls wanted the County to provide a cued-speech interpreter to be present, full-time, in Matthew's classroom. The interpreter's job would be to interpret the sounds in the classroom into physical representations that Matthew could understand. Thus, the interpreter they envisaged would need to be present during Matthew's religious instruction and would interpret that religious instruction to enable Matthew to understand.

The County denied the Goodalls' request, but offered to provide a cued speech interpreter to Matthew at Drew Middle School, a public school in Stafford County. Nothing suggests other than that the County stands ready to do so today. The Goodalls requested a due process hearing to challenge the County's position. The state Hearing Officer ruled that the County was not responsible for providing a cued speech interpreter to Matthew because he was unilaterally placed in a private, sectarian school by his parents for personal reasons. The Hearing Officer further held that for the County to provide a cued speech interpreter at Fredericksburg Christian School with public funds would violate the

Establishment Clause of the First Amendment to the United States Constitution.

The Goodalls appealed the Hearing Officer's decision to the Virginia Department of Education. The state Review Officer's decision of September 9, 1989 affirmed the decision of the HEaring Officer, specifically holding that the requested action would violate the Establishment Clause.

The Goodalls then filed the action currently before us on October 10, 1989, seeking an order directing the County to provide a cued speech interpreter for Matthew Goodall at Fredericksburg Christian School and seeking

reimbursement for their costs incurred in providing such an interpreter to Matthew.

From a summary judgment in the favor of the County School Board the Goodalls have appealed.

[1] We first address the question whether Virginia or the federal special education law requires the County to provide a cued speech interpreter to a student at a private, sectarian school. The Goodalls have contended that the Virginia laws and regulations implementing federal assistance under the Education of All Handicapped Children Act, 20 U.S.C. section 1400 et seq (EHA), require Stafford County to

provide Matthew with a cued speech interpreter at the Fredericksburg Christian School.

The EHA is a comprehensive entitlement program providing federal financial assistance to participating states for the education of handicapped children. To qualify for the funds, a participating state must have in effect "a policy that assures all handicapped children the right to free appropriate public education." Id. section 1412(1). See generally Board of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The Act places primary responsibility for the provision of such appropriate public education on state and local educational agencies. 20 U.S.C. section 1400. Receipt of federal

funds is also conditioned upon submission of a satisfactory special education plan. Id. section 1412(2).

The Commonwealth of Virginia is a participating state and has established the required policy in the Virginia Code, sections 22.1-213 to -221; the Virginia Constitution, art. VIII, section 10; and the state's special education regulations. See Schimmel By Schimmel v. Spillane, 819 F 2d 477, 484 (4th Cir. 1987). Virginia's policies and procedures have been approved by the United States Department of Education.[1]

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1. Fredericksburg Christian School is not on the list of private schools approved by the Virginia Department of Education to provide special education and related services under the EHA.

Several provisions of the Virginia Code implementing the EHA specifically draw a distinction between nonsectarian schools and sectarian school such as Fredericksburg Christian School. See Va. Code Ann., sections 22.1-216, 218, and 220. The Goodalls seek to advance the argument that the combined effect of the three statutes, limited as they are to non-sectarian private schools, does not prohibit the County from furnishing Matthew with a cued speech interpreter at a sectarian school because, while a religious school contract is not referred to in section 22.1-216, the County could provide the service with its own employees or with interpreters hired through non-sectarian schools or

agencies.[2] With the hope of buttressing their position, the Goodalls point to section 22.1-219 of the Virginia Code:

> Nothing in this article shall be construed to restrict or prohibit the use of any federal, state or local funds made available under any federal, state or local appropriation or grant.

Ingenious the Goodalls' arguments may be, but they fail to hold water when viewed from the greater context of the general prohibitions regarding sectarian schools found in the Virginia Constitution and other sections of the Virginia Code. As one example, in

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2. Other arguments to like effect are advanced that 1) the Goodalls, not the County School Board, would place Matthew at Fredericksburg Christian School, and 2) limitations as to what, under the law of the Commonwealth, the County School Board could do would not extend to county expenditure of federal EHA funds.

legislating for children in the custody of state boards or agencies, the General Assembly has authorized education in any public or "private nonsectarian school" but not in sectarian ones. Va. Code Ann section 22.1-7. In addition, Article VIII, section 10 of the Virginia Constitution prohibits appropriations to sectarian schools or institutions of learning.

Virginia's constitutional terms and statutory language consistently express a policy of funding special education only in nonsectarian schools. Section 22.1-219 was simply designed to ensure that handicapped students are not denied the benefit of other federal, state or local programs simply because Virginia has mandated the delivery of a free and

appropriate education for them. The interpretation sought by the Goodalls would eliminate in large measure the "nonsectarian" qualification in Virginia Code sections 22.1-216, 218, and 220, as well as the Virginia Constitution. See Posey v. Commonwealth, 123 Va. 551, 553, 96 S.E. 771 (1918) (ruling that a statute should be interpreted in a way that gives effect to all of its provisions).[3]

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3. The Goodalls' reliance upon Va. Special Educ. Reg. 3.4(B)(7) is similarly unavailing. That regulation merely stands for the proposition that if a parochial school student takes advantage of special education and related services offered by the local educational authority, representatives of the parochial school must be afforded the opportunity to participate in the development of the student's IEP. Nothing in the language of the regulation suggests a requirement for the County to provide special education and related services to parochial students on site.

Moving agilely to another legal area, the Goodalls next contend that, even if Virginia law can be construed as prohibiting the County's provision of a cued speech interpreter at Fredericksburg Christian School, federal law - the EHA - mandates such a requirement, and thus by nature of the Supremacy Clause, displaces Virginia law.

The attempt to place state and federal law at odds with one another is grounded on an assertion made by the County before the district court a) that the EHA expressly incorporates state educational standards, and b) that, when a handicapped child is educated at a private school under the EHA, the state

has an obligation to ensure that the school meets those educational standards. See Schimmel By Schimmel, 819 F 2d at 484; 20 U.S.C. section 1413(a)(4)(B).

The Goodalls have noted that the EHA, the federal regulations promulgated thereunder, and the Virginia Special Education Regulations all draw distinctions between handicapped students enrolled in private schools by the state and handicapped students enrolled in private schools by their parents. The federal statute, 20 U.S.C. section 1413(a)(4)(B), which places an obligation upon the state to ensure that private schools meet state educational standards explicitly applies only to students placed in private schools by

the state. Thus, the Goodalls urge, in a logical leap of rather Gargantuan size, that the EHA prohibits the state from imposing its educational standards - specifically, the sectarian, non-sectarian distinction - on private schools at which handicapped students are voluntarily enrolled by their parents.

If anything, however, section 1413(a)(4)(B) imposes an additional burden on the state when expending federal funds by enrolling handicapped students at private schools. In such a case, for example, the EHA would prohibit a state from placing a handicapped student in a non-accredited private school. With regard to expenditures of federal funds for

handicapped students voluntarily enrolled at private schools, the state is simply relieved of its state standard burden, if it so chooses, but is free, on the other hand, to take on that burden if it wishes.

The distinction does take on additional significance, however, with regard to the type of assistance the EHA requires to be provided. And as the district court has correctly asserted, the key issue in the instant case is the meaning of the regulatory requirement that school divisions "provide" special education and related services to private school handicapped children.

34 CFR section 300.403(a) provides that

> [i]f a handicapped child has available a free appropriate public education and the parents choose to place the child in the private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under sections 300.450-300.460. (Emphasis added.)

34 CFR section 300.452 provides:

> Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency. (Emphasis added.)

And 34 CFR section 76.654(a), part of the Educational Department General Administrative Regulations (EDGAR), obliges local school divisions to provide "program benefits" that are "comparable in quality, scope, and opportunity for participation" to the

program benefits that the subgrantee provides for students enrolled in public schools.

Despite the fact that the County stands ready to provide Matthew with a cued speech interpreter at Drew Middle School, the Goodalls insist that the federal regulations quoted above require the provision of such services on the premises of sectarian institutions.[4] A wealth of authority from federal district courts, the Department of

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4. Apparently the argument must become that Matthew does not have "available a free appropriate public education" because education is not appropriate unless it is provided at Fredericksburg Christian School. While we admire the Goodalls' tenacious attempts, any such contention, if successful, would play ducks and drakes with the statute and regulations.

Education, and other sections of the Code of Federal Regulations, however, overwhelmingly refutes the argument.

In McNair v. Cardimone, 676 F. Supp. 1361 (S.D. Ohio 1987), the district court held:

> Where a free appropriate public education is available, and the parents choose to place their child in a private school, the school district is not required to pay for the child's education, but is only required to (1) have free appropriate public education available to the child should she return to public school, and (2) provide a genuine opportunity for equitable participation by the child in programs funded under part B of the Act within the jurisdiction served by the local school district.
>
> ***
>
> We find that section 300.452 can only be interpreted to mean that a local school district need not pay for a child's related services when the child's parents choose to place her in a private school.

Id. at 1372 (emphasis added). See also Work v. McKenzie, 661 F. Supp. 225, 229 (D.D.C. 1987) (when public agency provides free appropriate public education, and parents choose to place child in private school nevertheless, public agency is not required to pay for child's education at private school).

In Barnett v. Fairfax County School Board, 927 F 2d 146 (4th Cir. 1991), we held that the local school system was not required to duplicate a cued speech program for the plaintiff alone merely because there existed a high school which was slightly closer to his house or which he would rather attend. In so ruling we noted that "[a]dopting plaintiff's position would require us to intrude upon the educational policy

choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make." Id. at 152-153.

The emphasis on provision of an opportunity is clearly stated in 34 CFR section 76.651(a)(1):

> A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in sections 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

If the Goodalls are held to be correct in their reading of federal law, the U.S. Department of Education would not properly have been able to accept the prohibitions on services to sectarian schools contained in Virginia's constitution and statutes. Nor would it have approved the Virginia regulation listing acceptable alternatives for school division compliance with 34 CFR section 300.403, which provides:

> Services to private school handicapped children may be provided through dual enrollment, educational radio and television, and the use of mobile educational services and equipment.

Va. Spec. Educ. Reg. III(3.4)(B)(9)(c) at 73.

Most telling is the Department of Education's response to an inquiry submitted by Robert Goodall to Dr. Judy Schrag, Director of the Office of Special Education Programs, reported at Goodall, 16 EHLR 1398 (1990). In the inquiry, Goodall asked the Department to invoke a "by-pass" provision set out in section 1413(d) of the EHA, whereby the Secretary of Education is authorized to implement a bypass if a state educational agency is prohibited by law from providing for the participation of private school handicapped children in the program assisted or carried out under the Act. The law Goodall claimed as the basis of his by-pass request was Va. Code Ann. section 22.1-216, supra.

In denying Goodall's request, the Department stated:

> The statutory provision [section 22.1-216], on its face, only precludes a local educational agency (LEA) in Virginia from contracting with private sectarian schools for the purpose of providing special education to children with handicaps enrolled in those schools. There is nothing in the law which would prevent an LEA from using its own personnel and facilities to provide special education to those students, as long as it did not contract with a private sectarian school. At most, this law precludes LEAs from serving children with handicaps on the site of private sectarian schools. A limitation on the location at which some children with handicaps enrolled in private schools can be served, however, does not constitute a prohibition against the participation of these children in the special education program carried out pursuant to the EHA-B by Virginia and its LEAs . . .
>
> SEA's [State educational agencies] and LEAs do not necessarily have to provide services on the premises of private schools in order to meet their obligations under 20 USC section 1413(a)(4)(A). Rather, department regulations provide that

> students with handicaps enrolled in private schools must be provided by SEAs and LEAs "with a genuine opportunity for equitable participation' in the special education carried out by these agencies. The Department has long held that it is possible for SEAs and LEAs to provide students with handicaps enrolled in private schools with a genuine opportunity for equitable participation by serving them at a public school or neutral site. Whether an LEA would have to provide on-site services to meet the "equitable participation" requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services.

Id. at 1399-1400 (citation and footnote omitted).

In short, by offering Matthew the services of a cued speech interpreter at Drew Middle School, the County is in full compliance with the requirements of the EHA and the regulations promulgated thereunder. If the County's offer of

services in a public school is "meaningless" to Matthew, as his parents claim, it is because of the parents' decisions and conditions for Matthew's education, not by the operation of any state or federal law.

Finally, lest there be any remaining question as to a conflict between the EHA and the prohibitions against funding to sectarian schools imposed by Virginia, 34 CFR section 76.532 of EDGAR provides, in pertinent part,

(a) No state or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

The County's provision of a cued speech interpreter to Fredericksburg Christian School would fall squarely within the regulation's prohibition.

[2] Failing to persuade us at the statutory level that cued speech must be provided to Matthew at Fredericksburg Christian School, the Goodalls have turned to the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. They have insisted that the district court's reaching a decision on non-constitutional grounds could not stop there but must proceed to discuss constitutional problems. We agree.

This is not a case where resolution of the constitutionality of a statute may be avoided where a construction of the statute is fairly possible. See Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 122, 76 S. Ct 663, 666, 100 L. Ed. 1003 (1956) ("case must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems"); 16 Am. Jur. 2d Constitutional Law sections 160, 172 (1979). It is not the state or federal education statutes the Goodalls challenge constitutionally, but rather, the actions of the County. We must thus go on to consider whether the County's actions pass constitutional muster. See Johnson v. Mayor and City of Baltimore,

731 F 2d 209, 210-11 (4th Cir. 1984)(Baltimore City's pension plan examined under Equal Protection Clause of Fourteenth Amendment and under Age Discrimination in Employment Act of 1967, 29 USC section 621 et seq.).

The Goodalls have alleged that the County's denial of publicly funded cued speech interpretation at Fredericksburg Christian School burdens their religious belief that "they are to provide their children with Christian education and to educate their children in Christian schools." In so asserting, they rely on a line of Supreme Court cases holding that the denial of unemployment compensation benefits for persons whose religious beliefs prevented them from working on certain days of the week or

in certain occupations violated the Free Exercise Clause of the First Amendment. Frazee v. Illinois Dep't of Employment Security, 489 US 829, 109 S. Ct. 1514, 103 L Ed 2d 914 (1989); Hobbie v. Unemployment Appeals Comm., 480 US 136, 107 S Ct 1046, 94 L Ed 2d 190 (1987); Thomas v. Review Board of Indiana Employment Security Division, 450 US 707, 101 S Ct 1425, 67 L Ed 2d 624 (1981); Sherbert v. Verner, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963). The court held, for example, in Thomas that,

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the

> compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 US at 717-18, 101 S Ct at 1431-32. Those cases held that such infringements must be subjected to district scrutiny and can be justified only by a compelling state interest. Because we find a compelling state interest to exist, we find that the Free Exercise clause has not been violated.

It is the well-settled law of the Fourth Circuit that the avoidance of a violation of the Establishment Clause of the First Amendment constitutes such a compelling state interest. See Smith v. County of Albermarle, 895 F 2d 953, 959-60 (4th Cir.), cert. denied, - US -, 111 S Ct 74, 112 L Ed 2d 48 (1990); Langlotz v. Picciano, 683 F Supp. 1041,

1048 (E.D. Va. 1988), aff'd, 905 F 2d 1530 (4th Cir. 1990) ("Plaintiff's free exercise rights . . ., if any, are clearly outweighed by the [state's] compelling interests in avoiding Establishment Clause violations").[5] Accordingly, the County's decision not to provide Matthew with a cued speech interpreter in connection with his attendance at a sectarian school and the prohibitions against its so providing contained in Virginia and federal law, do not violate the Free Exercise Clause contained in the First Amendment of the Federal Constitution. It would be out

---

5. The County's refusal to provide an interpreter is also justified by a compelling interest in not violating the establishment clause of Va. Const. art. I, section 16.

of the frying pan into the fire for the County to accede to the Goodalls' demands.

[3] The seminal Establishment Clause case is Lemon v. Kurtzman, 403 US 602, 91 S Ct 2105, 29 L Ed 2d 745 (1971), in which the Supreme Court has set forth a three-part test to determine whether government action impermissibly establishes, sponsors, or results in active involvement in religious activity. Such action violates the constitution if any one of the following prongs is not satisfied:

1. the government action must have a secular purpose;

2. the action must not have the primary effect of advancing religion; and

3. the action must not create excessive entanglement between church and state.

Id. at 612-13, 91 S Ct at 2111-12.

One proposition advanced by the County was that a cued speech interpreter at Fredericksburg Christian School would participate in the inculcation of religious tenets and beliefs, because the interpreter would communicate to Matthew all the religious messages propounded by Matthew's teachers. The Goodalls have attempted to counter that, even if the EHA were held to permit the provision of an interpreter at a sectarian school, the statute as a whole would still not have the primary effect of advancing religion.

The Supreme Court has denied various types of aid and services to Christian schools while permitting others, and a discussion of the distinctions between the two is instructive. In Lemon v. Kurtzman, the Court struck down statutes in Pennsylvania and Rhode Island which would have permitted the states to pay teacher salary supplements as well as provide reimbursement for textbooks and instructional materials. The reimbursement provisions were struck down despite guarantees that the teachers would segregate their religious beliefs from their teaching responsibilities, because "the potential

for impermissible fostering of religion [was] present." 403 US at 619, 91 S Ct at 2114.

In Meek v. Pittenger, 421 US 349, 95 S Ct 1753, 44 L Ed 2d 217 (1975), the Court noted that even providing instructional material and equipment to "religion pervasive institutions" would impermissibly foster religion even though those items were "ostensibly limited to wholly neutral, secular instructional material and equipment." Id. at 366, 95 S Ct at 1763.

Finally, in Grand Rapids School District v. Ball, 473 US 373, 105 S Ct 3216, 87 L Ed 2d 267 (1985), the Court, in striking down a scheme to provide public school programs on non-public

school sites, discussed how publicly funded programs related to education might impermissibly advance religion:

> First, the [personnel] participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial, symbolic link between government and religion, thereby enlisting - at least in the eyes of impressionable youngsters - the powers of government to the support of the religious denomination operating in the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

Id. at 385, 105 S Ct at 3223. The Grand Rapids Court went on to note that "[a]lthough Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or

government-sponsored indoctrination into the beliefs of a particular religious faith." Id.

Viewed in the light of those cases, especially the holding in Meek v. Pittenger, the providing of a cued speech interpreter in attendance at all-day sessions at a sectarian school would undoubtedly infringe the Establishment Clause. At least one district court has reached the same conclusion. In Zobrest v. Catalina Foothills, 1988-89 EHLR 441:564 (D. Ariz., July 19, 1989), the court ruled that

> the provision of a publicly-paid sign language interpreter at Salpointe, a pervasively sectarian school, would violate the separation of church and state.

***

> The interpreter would act as a conduit for the religious inculcation of James - thereby promoting James's religious development at government expense. That kind of entanglement of church and state is not allowed.

ID. (citing Grand Rapids and Meek v. Pittenger).

The cases of indirect aid which the Supreme Court has sanctioned and upon which the Goodalls rely are readily distinguishable from the instant facts.

The Goodalls rely primarily upon Witters v. Washington Dep't of Services for the Blind, 474 US 481, 106 S Ct 748, 88 L Ed 2d 846 (1986). Witters was a student attending a Christian College in the State of Washington who suffered from a progressive visual condition which made him eligible for state

vocational rehabilitation assistance to blind persons. Witters applied to a state agency for rehabilitation assistance consisting of payments for education. The Court held that the extension of aid under the Washington program to finance his training at the Christian college would not advance religion in a manner inconsistent with the Establishment Clause.

Witters is the last of a line of cases in which the Supreme Court has upheld tax deductions taken by and tuition reimbursements to students at religious institutions. See Committee for Public Education & Religious Liberty v. Regan, 444 US 646, 100 S Ct 840, 63 L Ed 2d 94 (1980); Committee for Public Education & Religious Liberty v.

Nyquist, 413 US 756, 93 S Ct 2955, 37 L Ed 2d 948 (1973); Sloan v. Lemon, 413 US 825, 93 S Ct 2982, 37 L Ed 2d 939 (1973). As such, the decision has little application to the instant case. In each of those cases, the Court was confident that there existed an "effective means for insuring that the cash reimbursements would cover only secular services." Regan, 444 US at 659, 100 S Ct. at 849. Witters and its predecessors provide little or no support for the provision of state-funded personnel working at sectarian institutions who would be directly involved in the inculcation of religious beliefs of the handicapped students they served.

Board of Educ. v. Allen, 392 US 236, 88 S Ct. 1923, 20 L Ed 2d 1060 (1968), and Wolman v. Walter, 433 US 229, 97 S Ct 2593, 53 L Ed 2d 714 (1977), also cited by the Goodalls, provide them with little support as well. In Board of Educ. v. Allen, the Court upheld a law which required public school authorities to lend textbooks free of charge to students in private schools even if the schools were religious. 392 US at 248, 88 S Ct at 1929. And in Wolman v. Walter, the Court approved the provision of state-prepared standardized tests and some health diagnostic services to sectarian school students. 433 US at 244, 97 S Ct at 2603. Essential to both holdings was the easily ascertainable,

purely secular content of the goods and services provided. In Matthew's case, the religious content of the cued speech aid provided at Fredericksburg Christian School would be pervasive. The County, in the proceedings below, made the point (without the Goodalls apparently disagreeing) that religion permeated every aspect of the daily curriculum of the Fredericksburg Christian School, and that Matthew's cued speech interpreter would be interpreting for him at all times.

We consequently have come to the conclusion that the relief sought is not afforded on statutory grounds and that no First Amendment violations ensue.

The judgment is AFFIRMED.

[STIPULATED FACTS]

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

Matthew Goodall, A minor)
by his father and next
friend, Robert B. Goodall,)

Complainant)

v.) STIPULATION

The School Board of)
Stafford County, Virginia,
)

Respondent
)

The parties stipulate as facts in this proceeding the facts set forth in paragraphs 1 through 9 of the statement of facts in the memorandum in support of Matthew Goodall submitted to Thomas A. Mickler, the review officer in the proceeding.

_____

MATTHEW GOODALL, a minor by his father and next friend, Robert B. Goodall

THE SCHOOL BOARD OF STAFFORD COUNTY, VIRGINIA

BY: _____

KATHLEEN S. MEHFOUD, ESQ.

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

ADMINISTRATIVE REVIEW

IN RE: MATTHEW GOODALL

STAFFORD COUNTY PUBLIC SCHOOLS

MEMORANDUM IN SUPPORT OF MATTHEW GOODALL

STATEMENT OF FACTS

At the hearing officer level the Goodalls requested that the facts listed in paragraphs 1-6 below be established either by stipulation or by proof at a hearing. No evidence was heard. The hearing officer did not make express findings of facts.

1. Matthew Goodall has been a resident of Stafford County since his birth. He became profoundly hearing impaired after an attack of meningitis at age 3 1/2. Shortly thereafter, he was identified as a handicapped child for whom special education services were appropriate, and began a preschool class using cued speech. At that time, Stafford County participated with other school divisions in a regional special education program. Matthew's class at Spotswood Elementary School included several other deaf children who were about his age: Wendy Cowan, Michelle Ayers, and Amy McGlone. As the children progressed in the use of cued speech and as they became kindergarden and first grade age, they were progressively main

streamed at Spotswood Elementary using cuing interpreters. Those school divisions later separated their special education efforts. The same children continued to be mainstreamed in public schools, each with a full-time, one-on-one, fluent cuing interpreter: Wendy Cowan in the Spotsylvania County schools, Michelle Ayers in the Stafford County schools, and Amy McGlone in the Fredericksburg City schools.

2. Cued speech is a visual representation of spoken language. It is a phonetic system. For example, every "guh" sound appears the same, whether the "guh" appears in "guppy", "government", or "kangaroo". Cued speech enables a deaf person to distinguish every sound spoken to him.

For example, the sounds "m" and "b" look alike on the lips of the speaker. Obviously, they sound different. In cued speech, different hand shapes in different positions near the mouth of the speaker distinguish sounds that look the same. One advantage of cued speech is that both the speaker and the "listener" do not learn any new vocabulary. Cued speech is conceptually very easy to understand, but it takes months for a highly motivated person to be able to cue conversationally, i.e., to be able to cue anything he says. It takes even longer to cue fluently enough to "interpret" for another speaker who is speaking at his own conversational speed.

3. A cued speech interpreter does not teach. He or she is simply the "ears" of the hearing impaired child by simultaneously and visually representing the sounds of anyone speaking in the presence of the hearing impaired child. The interpreter does not affect the content of speech. In fact, a machine sometimes called an "autocuer" is being developed which may eventually take the place of the human interpreters.

4. For the 1988-89 school year, Matthew's parents placed him at Fredericksburg Christian School. Fredericksburg Christian School has never provided a cued speech interpreter to any student, and does not now provide a cued speech interpreter to Matthew Goodall. Matthew's parents have borne

the burden of providing interpreters: his mother Kathy Goodall has interpreted for him since the beginning of the 1988-89 school year. In addition, the Goodalls have paid Alicia Steele $107.70 per week to come to school three days a week, at first to improve her cuing skills, and then to take over some of the interpreting duties. Mrs. Steele had learned cued speech before the school year began, but was not fluent enough to interpret.

5. Stafford County agrees that a full-time interpreter for Matthew is appropriate.

6. An interpreter for Matthew would necessarily be one-on-one. Stafford County has no other 6th grade hearing impaired student using cued

speech. If there were more than one such student, they might each still require one-on-one interpreters for a variety of reasons, but that is not an issue in this case.

In addition they submit as facts the following:

7. Stafford County pays more than $7,000.00 for a qualified cued speech interpreter.

8. Matthew was placed by his parents in private, Christian schools from the early 1980's. When his parents requested special education for the 1988-89 school year, a new evaluation of Matthew was conducted to determine that he was handicapped (deaf) and required such services.

9. Matthew is successfully mainstreamed full time with hearing students at Fredericksburg Christian School. To be successfully mainstreamed, he requires the special education and related service of a full time, fluent cuing interpreter in his regular classroom. In contrast, the special education and related service of speech therapy need not be rendered in the regular classroom.

[April 11, 1989 Decision of State Hearing Officer, erroneously labeled "Decision of Review Examiner"]

V I R G I N I A:

VIRGINIA DEPARTMENT OF EDUCATION

Special Education Hearing

In re: Matthew Goodall

vs.

Stafford County School Board

DECISION OF REVIEW EXAMINER (sic)

Lewis C. Markel, Jr.
4551 Cox Road
Glen Allen, VA 23060

VIRGINIA:

SPECIAL EDUCATION HEARING

MATTHEW GOODALL

vs.

STAFFORD COUNTY SCHOOL BOARD

DECISION OF REVIEW EXAMINER (sic)

After careful consideration of the extensive briefing presented by counsel for Matthew Goodall, counsel for the Stafford County School Board, and an independent study by this Hearing Officer and his Associate, the following decision is rendered:

1. The Hearing Officer finds that the wording in the McNair vs. Cardimone applies. The state regulations do not require the state to assume the cost of a private education for a handicapped child or the cost of services related to

that private education which has been selected by the parents of the child for their own personal reasons, where the state has fulfilled its obligation by making its own appropriate program and related services available to those private school handicapped children.

2. Definitely the cued speech interpreter can edit at his will what is being taught the student. When the interpreter is required for 100% attendance, he violates the entanglement provision of the Constitution and is bound to interpret a certain percentage of religious teachings. This violates the entanglement of church and state. We agree that on occasion an assistant can be employed to assist a

hearing-impaired child, but in this case, the interpreter controls 100% of what this child hears.

3. In the Witter's case, relied upon by Mr. Goodall, "no entanglement challenge is properly raised on the record" according to the Supreme Court of the United States, thus, the entanglement issue was never raised in this case. Therefore, it has little relation to the case at hand.

4. Examining the record, all issues were stipulated and voluntarily waived as they rested upon this decision of the Hearing Officer. In view of the fact the decision is rendered in favor of the Stafford County School Board, the other issues are moot.

5. We are disturbed by the fact that the co-mingling of public funds to private institutions will water down the available funds for public education. The McNair case reinforces our concern.

6. Finally, in protection of the individual's right to attend private school, no public employee should spend each and every day on the school premises or we face the possibility of the government controlling freedom of religion and freedom of choice. This is the principle upon which this country was founded and the Constitution so written. We decide, therefore, that the Stafford County School system has an obligation to maintain services for the hearing-impaired and to employ efficient cued speech interpreters with the proper

training; but as long as efficient services are maintained within the public school system, we cannot allow public assistance to Matthew Goodall and thus, render a decision in favor of the Stafford County School Board.

April 11, 1989

Lewis C. Markel, Jr.
Hearing Officer

[Decision of State Review Examiner]

THOMAS A. MICKLER
Attorney at Law
422 North Columbus Street
Alexandria, Virginia 22314

September 9, 1989

Commonwealth of Virginia
Department of Education
P. O. Box # 6-Q
Richmond, VA 23216-2060

Attn. Ms. Kathy Klare,
Due Process Supervisor

Re: Matthew Goodall
vs.
Stafford County School Board

Gentlemen:

I regret taking so long with this matter but I found that it is a very close call. If it goes to the federal and/or state courts it could go either way.

However, after much soul-searching and study, I feel that I have made the correct decision in affirming the decision of the hearing officer. I could have given more reasons why I felt that the hearing officer was correct in

his decision, but I kept the matter as close to the original consideration as I could. It is my opinion that I should not go into matters not litigated in the original hearings.

Again, my regrets for my tardiness in this matter I feel that this or a very similar matter will and up before the Supreme Court of the United States of America for final decision.

Very truly yours,

Thomas A. Mickler

TAM/ssc.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

MATTHEW GOODALL,	)	
	)	
Petitioner	)	
	)	
vs.	)	Record No. _____
	)	
STAFFORD COUNTY SCHOOL BOARD,	)	
	)	
Respondent	)	

ORDER

Appeal from the decision of Lewis C. Markel, Jr., the hearing officer, dated: April 11, 1989.

This case arises from the appeal of Matthew Goodall from the decision of the hearing officer. The appeal is based on the denial of services to Matthew Goodall of a cuing interpreter at a private parochial school by the Stafford County School Board under the provisions of the public law passed by the 94th

Congress, Chapter 142. The school board objected to supplying the cuing interpreter at the Fredericksburg Christian School as this act would violate the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States of America.

The parties stipulated to the facts in writing and said stipulation is attached hereto and made a part hereof. However, the main facts are set forth herein as follows:

Matthew Goodall had an infection and it affected his hearing. In fact, he is seriously hearing impaired. He, at one time, was enrolled in the

Stafford County School System, but his parents removed him and enrolled him in the Fredericksburg Christian School.

Stafford County's School system supplied a cuing service to its hearing impaired students. The Fredericksburg Christian School does not have any such service available.

Matthew Goodall's parents petitioned Stafford County to supply a cuing interpreter at County expenses under the provisions of Public Law 94-146 of the United States Code. The County objected to this as to do so, in its view, would violate the First Amendment to the Constitution of the United States of America; that is the establishment of a religion. On this point, the issue was joined.

It is necessary to state that to comply with Matthew's request, the County School Board would have to pay for and send to the Fredericksburg Christian School a skilled cuing interpreter.

This hearing review officer agrees with the decision of the hearing officer entered on April 11, 1989. It is my belief that the maintenance and supplying of a cuing interpreter for Matthew Goodall at the Fredericksburg Christian School would violate the First Amendment to the Constitution of the United States of America. That is, such an act would be the establishment of a religion and violative of the first amendment.

This decision is based on Meek vs. Pittenger, Secretary, 421 U.S. 349 (1975). In the case, the Commonwealth of Pennsylvania authorized, by law, the providing directly to all children enrolled in non-public elementary and secondary schools that met the state's compulsory-attendance requirements "auxiliary services: The services included counseling, testing, psychological services, speech and hearing therapy and related services for exceptional, remedial or educationally disadvantaged students,: and such other secular, neutral, non-ideological services as are of benefit to non-public school children and are provided for those in public schools.

The Supreme Court of the United States of America found that this act to be unconstitutional as it would require the Commonwealth of Pennsylvania to assure that the school employees (the professionals) would not advance religion in the church-related school they serve. To assure that this would not be done, would require excessive entanglement of the state in the affairs of the church-related schools.

Similar results were found to be the case in Aguilar vs. Felton, 87 L. Ed. 2d 290.

For this reason, the decision of the hearing officer is affirmed.

Dated: September 9, 1989.

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Review Officer

E X E R P T

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MATTHEW B. GOODALL, et als., Plaintiffs,	)	
vs.	)	C.A. No. 89-1450-A
STAFFORD COUNTY SCHOOL BOARD, Defendant	)	

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 10 a.m. on February 9, 1990.

BEFORE: The Honorable James C. Cacheris, Presiding
United States District Judge

APPEARANCES:

For the Plaintiffs: Robert Goodall

For the Defendant: Scott Cairns, Esq.
Kathleen Mehfoud, Attorney
J.T. Tokarz, Esq.

PROCEEDINGS

THE COURT: I think I'm ready to rule on this now. I think I understand the issues on the motions for summary judgment. On the defendant's motion to dismiss or in the alternative for summary judgment, plaintiff's motion for summary judgment.

On October 10, 1989, plaintiffs filed this action against defendant Stafford County School Board alleging a violation of the Education of the Handicapped Act, 20 U.S.C. section 1400, et seq. (EHA) Specifically, plaintiffs contend that the Act violated by defendant's failure to provide a cued-speech interpreter for plaintiff Matthew Goodall at his current school.

Defendant however has offered to provide a cued-speech interpreter in the public school of Stafford County.

Matthew Goodall is a 12-year-old resident of Stafford County, Virginia, and has been profoundly hearing-impaired since age three and a half. Matthew is currently a student at Fredericksburg Christian School, a private, religious school located in Fredericksburg, Virginia. His placement at this school was voluntarily made by his parents in the Fall of '88.

On September 9, 1989, following a review of the facts and arguments made by the parties to this dispute, a Review Examiner of the Virginia Department of Education, affirming a decision by a Hearing Officer, found that Stafford

County was neither obligated to reimburse the plaintiffs nor in the future pay for a cued-speech interpreter.

The Hearing Officer had principally relied on McNair v. Cardimone, 686 F. Supp. 1361 (S.D. Ohio, 1987). McNair held that a school board was not obligated to provide transportation services to a hearing-impaired student to and from private, voluntarily-chosen school. The Review Examiner further found that even if the services of the cued speech interpreter were required to be furnished by the Stafford County School Board, such action would involve impermissible entanglement between the state and the religiously-affiliated school.

Plaintiffs contend that the EHA mandates the furnishing of the cued speech interpreter. The EHA, as reflected in Section 1413(e)(4)(B), provides that, quote, any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a state plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each plan shall -- (4) set forth policies and procedures to insure -- (A) that provision is made for the participation

of such handicapped children by providing for such children special education and related services, unquote,

Pertinent provisions of the Code of Federal Regulations, which interpret and explain the relative statutory sections also, according to the plaintiffs, require the defendant to pay for the interpreter.

Specifically, 34 C.F.R. 300.403 provides, in part, that:

Quote, (i) if a handicapped child has available a free appropriate public education and the parents choose to place the child in the private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility.

However, the public agency shall make services available to the child as provided under section 300.450-300.460, unquote.

34 CFR section 300.452 provides that, quote:

Each local educational agency shall provide special education and related services designed to meet the needs private school handicapped children residing in the jurisdiction of the agency.

"Special education" is defined by the statute to mean, quote:

Specially designed instruction, at no costs to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, 20 U.S.C. 1401(a)(16), unquote.

Further, "related services" quote:

Means transportation, and such developmental, corrective, and other supportive service (including speech pathology and audiology, psychological services) as may be required to assist a handicapped child to benefit from special education, 20 U.S.C. 1401(a)(17), unquote.

Plaintiffs thus contend that the defendant is obligated to pay for this clearly "related service" of a cued speech interpreter for Matthew, who was placed by his parents at this private school located in Stafford County, Virginia.

Plaintiffs further assert that not only would the providing of the interpreter not involve impermissible

church-state entanglement, but the failure to so provide would prohibit plaintiffs' constitutional right to the free exercise of religion. Plaintiffs contend that "a cued speech interpreter does not teach" but is merely a conduit or the means by which a hearing-impaired student receives information conveyed by the teacher.

Thus, implicit in the plaintiffs' argument is that no impermissible church-state entanglement exists for even though the interpreter will be paid by the state, the interpreter (and indirectly the state) is not affirmatively communicating any message religion or otherwise.

Plaintiffs also argue that by denying Matthew Goodall the assistance of a cued speech interpreter at the Fredericksburg Christian School, but providing such assistance to hearing-impaired public school students, the state is essentially penalizing Matthew for his religious beliefs and thus violating his right of free exercise of religion.

Defendant first contends that the EHA does not require it to provide Matthew a cued-speech interpreter at the Fredericksburg Christian School. In this regard, the defendant argues that pursuant to Virginia law it is not required to pay for a cued-speech interpreter at the Fredericksburg

Christian School. Indeed Virginia law prohibits the Fredericksburg Christian School from receiving any EHA funding.

Defendant stresses that it has repeatedly indicated to the plaintiffs that a cued-speech interpreter is available through the Stafford County School System. Defendant refers to Virginia Code sections 22.1-216 and 22.1-218. Section 22.1-216 provides, quote:

A school board may provide special education for handicapped children either directly which its own facilities and personnel or under contract with another school division or divisions or any other public or private nonsectarian school, agency or institution approved by the Board of Education, unquote.

Section 22.1-218 provides, in relevant part, that, quote" if a school division is unable to provide a free, appropriate public education to a handicapped child and it is not properly available in a state facility, it shall offer to place the child in a nonsectarian private school for the handicapped approved by the Board of Education or such other licensing agency as may be designated by state law, unquote.

Because the Fredericksburg Christian School is a sectarian and not a nonsectarian private school, defendant contends that it is under no obligation to pay for plaintiffs' cued-speech interpreter. Schimmel by Schimmel v. Spillane, 819 F 2d 477 (4th Cir. 1987)

states that the Virginia statute makes clear that a school system can provide free appropriate education to handicapped children in private schools only when those schools are approved by the Virginia Board of Education or some other designated licensing agency. The statute simply does not permit school systems to place and fund handicapped children in unapproved private schools.

The Virginia statute's requirement of Board approval for private schools educating handicapped students is a State educational standard that has been incorporated into the EHA. See 20 U.S.C. section 1430(a)(4)(B), 34 C.F.R. 300.401(a)(3). Thus, school systems in Virginia could not place and fund handicapped children in unapproved

private schools without violating the EHA's requirement that handicapped children be educated at public expense only in those private schools that meet state educational standards. 819 F 2d 477 (4th Cir. 1987). The EHA defines "free appropriate education" to mean special education and related services that have been provided at public expense, under public supervision and direction, and without charge, and meet the standards of the state educational agency.

20 U.S.C. 1413(a)(4)(B) provides in part that, quote:

Handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized

education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such school or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter.

In reviewing a motion to dismiss, dismissal will not be warranted, quote, unless it appears to a certainty that the non-moving party would be entitled to no relief under any state of facts which could be proven in support of its claim. Adams v. Bain, 697 F 2d 1213, 1216, (4th Cir. 1982).

Summary judgment, quote, should be granted only where it is perfectly clear that no issue of fact is involved and

inquiry into the facts is not desirable to clarify the application of law. The burden is on the moving party to show that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, unquote. Charbonnages de France v. Smith, 597 F 2d 406, 414 (4th Cir. 1979).

In addition, as to the burden of the nonmoving party, the Supreme court has stated, quote:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of

proof at trial, unquote. Celotex Corporation v. Catrett, 477 U.S. 317 (1986).

Further, the mere existence as to an alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. That's Anderson v. Liberty Life, Inc., 477 U.S. 242, 247-248, (1986).

Both sides agree that Matthew is hearing-impaired, that the Fredericksburg Christian School is a private, religious school, and that the State of Virginia is, under appropriate circumstances, eligible for EHA funding. The Court will find, as the defendant's have argued, they have offered a cued public school, that this offer was rejected by the plaintiffs

Fredericksburg Christian School was a religious school the cued interpreter would be in class 100 percent of the time.

The Court finds that no genuine issue of material fact exists that this matter is appropriate for summary judgment.

The first issue is whether the EHA requires defendant Stafford County School Board to pay for a cued-speech interpreter for Matthew Goodall at the Fredericksburg Christian School. The EHA and the regulations promulgated thereunder provide that when a handicapped child has been placed at a private school by his parents (and not by the State), "special education" and "related services" should be provided.

The key issue which emerges from a review of the arguments made by both sides is how the EHA, its regulations and the companion Virginia statute provisions define "provide". Plaintiffs contend that "to provide" means to pay for the services of a cued-speech interpreter who is operating on the premises of the Fredericksburg Christian School. Defendant, however, argues that "to provide" means to make available the services of a cued-speech interpreter at a designated Stafford County public school, which defendant has so offered to the plaintiffs.

The case of McNair v. Oak Hills Local School District, 872 F 2d 153 (6th Cir. 1989) involved a situation similar to the one before the court. In McNair

the issue was whether defendant school district was obligated under the EHA and companion state law provisions to provide transportation to and from a private school to a hearing-impaired student. The Sixth Circuit put forth a four-part test to determine whether such a requested service must be provided. The Court stated that, quote:

Plaintiffs will succeed only if they establish that which section 1400(c) requires: (1) that the child is handicapped; (2) that transportation is a related service; (3) that the related service is designated to meet the unique needs of the child caused by the handicap; and (4) the school district must be responsible under EHA and its regulations for providing the related

services under the particular circumstances of the case at hand. McNair, 872 F 2d 156, unquote.

The McNair court found the third element not met, that the requested transportation was not a "related service designed to meet the unique needs of the child caused by the handicap".

Having found this element not satisfied, the court felt it unnecessary to proceed to the fourth element. In the case before the Court, a cued-speech interpreter is a service peculiar to the needs of a deaf person and thus is a service "designed to meet unique needs of the child caused by the handicap". The inquiry therefore turns on whether this fourth prong of the McNair test is

met, whether the school board must be responsible under the EHA and its regulations to provide this service.

The relevant regulations promulgated under the EHA indicate only that a local school board "shall provide" or that "provision is made by providing handicapped children with special education or related services". See 34 C.F.R. sections 300.451 and 452.

Further, numerous courts have held that the EHA does not require states to make available the best possible option. Springdale School District #50 of Washington v. Grace, 693 F 2d 41, 44, (8th Cir. 1982), citing Board of Education of the Hendrick Hudson Central

School District v. Rowley, 458 U.S. 176 (1982). See also Riley v. Ambach, 508 F. Supp. 1222, (S.D. N.Y. 1980).

In addition, the Virginia law provisions implementing the EHA make clear that any in-school (or on-premises) services of the type requested by the plaintiffs will only be furnished to approved nonsectarian schools. The Fredericksburg Christian School is not such a school. The Court therefore finds that the Stafford County School Board is not obligated to pay for a cued-speech interpreter operating on the premises of the Fredericksburg Christian School. The Court in reaching the decision is reaching it without resorting to the constitutional issues as can interpret it as such without

reaching constitutional issues as I feel I can so I'm not reaching constitutional issue. Accordingly the plaintiffs' motion for summary judgment is denied. The Court will grant defendant's motion for summary judgment.

I will enter an appropriate order.

I will recess until 10 o'clock Monday morning.

(At 4:15 p.m., the hearing on the above-entitled matter was concluded.)

This is to certify that the foregoing 13 pages are a true and correct transcription of my stenotype notes of the proceedings had on February 9, 1990, in the case of:

Matthew B. Goodall, et al.

vs.

Stafford County School Board

C.A. No. 89-1450-A.

This 6th day of March, 1990.

_____

OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

[Department of Education letter on related "bypass" issue: Goodall, 16 EHLR 1398 (1990)]

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 13, 1990

Robert B. Goodall, ESq.
Easterling & Goodall
Attorneys at Law
P. O. Box 177
Stafford, VA 22554-0177

Dear Mr. Goodall:

Thank you for your letter of March 28, 1990 to Dr. Judy Schrag, Director of the Office of Special Education Programs (OSEP), requesting a by-pass pursuant to 20 USC section 1413(d) of Part B of the Education of the Handicapped Act (EHA-B).

The EHA-B provides that State educational agencies (SEAs) must establish policies and procedures which ensure:

> that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services. 20 USC section 1413(a)(4)(A).

The by-pass provision you are asking the Department to invoke, which is set out as 20 USC section 1413(d), deals with certain specified circumstances under which State law prohibits the provision of special education and related services to students with handicaps enrolled by

their parents in private schools. The EHA-B regulation which implements this provision states that:

> (a) the Secretary implements a by-pass if a State educational agency is, and was on December 2, 1982, prohibited by law from providing for the participation of private school handicapped children in the program assisted or carried out under this part, as required by section 613(a)(4)(A) of the Act and by sections 300.451-300.452. 34 CFR sections 300.480(a) (emphasis added).

The Virginia law, which you cite as the basis for your by-pass request, provides that:

> A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions of any other public or private nonsectarian school, agency, or institution approved by the Board of Education. VA Code section 22.1-226 (emphasis added).

This statutory provision, on its face, only precludes a local educational agency (LEA) in Virginia from contracting with private sectarian schools for the purpose of providing special education to children with handicaps enrolled in those schools. There is nothing in this law which would prevent an LEA from using its own personnel and facilities to provide special education to those students, as long as it did not contract with a private sectarian school. At most, this law precludes LEAs from serving children with handicaps on the site of private sectarian schools. A limitation on the location at which some children with handicaps enrolled in private schools

can be served, however, does not constitute a prohibition against the participation of these children in the special education program carried out pursuant to the EHA-B by Virginia and its LEAs. As a consequence, your letter, as more fully explained below, does not establish the necessary basis for implementation of a by-pass.[1]

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1. Your letter also does not provide any information on whether this law was in effect on December 2, 1982. We are therefore unable to determine whether it meets this criterion for implementation of a by-pass. However, it is not necessary for us to address this issue since we have concluded, on the basis of the information you have provided us, that Virginia law does not prevent public agencies in the Commonwealth of Virginia from meeting their EHA-B obligation to serve children with handicaps enrolled in private schools.

SEAs and LEAs do not necessarily have to provide services on the premises of private schools in order to meet their obligations under 20 USC section 1413(a)(4)(A). Rather, Department regulations provide that students with handicaps enrolled in private schools must be provided by SEAs and LEAs "with a genuine opportunity for equitable participation" in the special education programs carried out by these agencies. See 34 CFR section 76.651 (which is incorporated by reference into the EHA-B's regulations at 34 CFR section 300.41(b)). The Department has long held that it is possible for SEAs and LEAs to provide students with handicaps enrolled in private schools with a

genuine opportunity for equitable participation by serving them at a public school or neutral site.[2] Whether an LEA would have to provide on-site services to meet the "equitable participation" requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services.

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2. The Department, in response to public comment on the proposed by-pass regulation, explained that:

> No one way of delivering services to private school handicapped children is required under the EHA-B, either in States subject to a by-pass or the States that are not. 49 Fed. Reg. 48520-48521 (December 12, 1984).

These arrangements have included, among other things, serving children with handicaps enrolled in private schools at public school or neutral sites.

Your letter, at most, alleges that Virginia law prohibits the Stafford County LEA from providing a sign-language interpreter at the site of the private sectarian school attended by your son. The EHA-B by-pass provision, however, is only intended to be implemented on a State-wide basis. The Department, in response to public comment on the proposed by-pass regulation, explained that:

> The by-pass authority contained in Section 613(d) of the Act requires operation on a State-wide basis. Section 613(d) of the Act, in contrast to Chapter 1 of the Education Consolidation and Improvement Act of 1981, makes no provision for the implementation of a by-pass for only those local educational agencies that have substantially failed to provide for the participation on an equitable basis of private school handicapped children. 49 Fed. Reg. 48522 (December 12, 1984).

Implementation of a by-pass, therefore, is not an appropriate remedy in this instance because there has been no demonstration that the Virginia law has had a State-wide impact on the provision of services to students with handicaps enrolled in private schools. Moreover, there has been no demonstration that even the Stafford County LEA has failed to meet its obligations under the EHA-B because Section 613(a)(4)(A) does not provide each child with handicaps voluntarily enrolled in a private school with an individual entitlement to participate in the special education program carried out by the SEA and LEAs pursuant to the

EHA-B. The Secretary, in response to public comment on the proposed by-pass regulation, explained that:

> Section 613(a)(4)(A) only imposes an obligation on States to provide for the participation of handicapped private school children in the program carried out pursuant to the EHA-B and does not require that services be provided to each and every private school handicapped child. Moreover, Section 613(a)(4)(A) allows for consideration of the number and location of private school handicapped children in the State in providing services to those children. The Secretary views Section 613(a)(4)(A) as providing States and the Secretary with the discretion to devise, in consultation with private school representatives, the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children. This interpretation has been consistently followed by the department, and applied to States, under the original regulations for the EHA-B (45 CFR section 121a.451-121a.460 (1977)) and the [Education

Department General Administrative Regulations] EDGAR provisions which replaced them in 1980. 49 Fed. Reg. 48522 (December 12, 1984) (emphasis added).

Consequently, the Stafford County LEA, in order to meet its obligations under Section 613(a)(4)(A) of the EHA-B, does not necessarily have to provide for the participation of your child in its special education program. Similarly, even assuming that a by-pass were implemented in Virginia, there is no guarantee that your child would be served.

If you have additional information to support your request for a by-pass in the Commonwealth of Virginia, please

write us again and we will reconsider your request in light of that information.

Sincerely,

Robert R. Davila
Assistant Secretary

cc: Dr. William Helton
Virginia Department of Education

United States Constitution

Article VI

This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

Title 1 of the Elementary and Secondary Education Act of 1965, formerly 20 USC sec 241e(a), subsequently sec 241e-1

(a) To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate ...

20 USC sec 1400 et seq, Individuals with Disabilities Education Act

20 USC sec 1401 (a)(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability including -

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 USC sec 1413 (a) . . . Each such plan shall -

(4) set forth policies and procedures to assure -

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and

(B) (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as

required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

(ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

20 USC sec 1413(a) each state plan shall . . . (9) provide satisfactory assurance that Federal funds made available under this part [20 USCS sec 1411] (A) will not be commingled with state funds, and (B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handicapped children under this part [20 USCS sec 1411] . . .

20 USC sec 1415 (E)(2) Any party aggrieved by the findings and decision made under subsection (b) . . . shall have the right to bring a civil action

with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a direct court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

42 USC sec 1983 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

Federal Regulations

Regulations promulgated under Education of the Handicapped Act as amended by the Education of All Handicapped Children Act now Individuals with Disabilities Education Act 34 CFR sec 300.400 et seq

34 CFR sec 300.400 applicability of Regs. 300.401-300.403

Regs. 300-401-300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

34 CFR sec 300.401 responsibility of state educational agency

Each State edueational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized educational program which meets the requirements under Regs. 300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B))

34 CFR sec 300.402 implementation by state educational agency

In implementing Reg. 300.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires:

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B))

34 CFR sec 300.403, Placement of children by parents

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Regs. 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of

financial responsibility, are subject to the due process procedures under Regs. 300-500-300.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415)

34 CFR sec 300.450, Definition of "private school handicapped children"

As used in this part, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under Regs. 300.400-300.402.

(20 U.S.C. 1413(a)(4)(A))

34 CFR sec 300.451, State educational agencies responsibility

The State educational agency shall insure that -

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in 34 CFR 76.651-76.663 of EDGAR are met.

(20 U.S.C. 1413(a)(4)(A))

34 CFR sec 300.452, Local educational agency responsibility

(a) Each local educational agency shall provide special education and related services designed to meet the

needs of private school handicapped children residing in the jurisdiction of the agency.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

34 CFR sec 300.552 Placements

Each public agency shall insure that: . . . (c) unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and . . .

Comment . . . The overriding rule in this section is that placement decisions must be made on an individual basis. . .

Education division general administrative regulations (EDGAR) 34 CFR sec 76.1 et seq

34 CFR sec 76.1(a)
Programs to which Part 76 applies.

(a) The regulations in Part 76 apply to each State-administered program of the Department.

34 CFR sec 76.532 Use of funds for religion prohibited

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vacation; or

(2) Prepare them to teach theological subjects.

34 CFR sec 76.650 Private schools: purpose of sec 76.651-76.662

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

NOTE: Some program statutes authorize the Secretary - under certain circumstances - to provide benefits directly to private school students. These "bypass" provisions - where they apply - are implemented in the individual program regulations.

sec 76.651 Responsibility of a State and a subgrantee

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in sec 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in sec 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1)

sec 76.652 Consultation with representatives of private school students

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.653 Needs, number of students and types of services

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.654 Benefits for private school students

(a) Comparable benefits. The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) Same Benefits. If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) Different benefits; If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.655 Level of expenditures for students enrolled in private schools

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is

different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.656 Information in an application for a subgrant

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with sec 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.657 Separate classes prohibited

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.658 Funds not to benefit a private school

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than;

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.659 Use of public school personnel

A subgrantee may use program funds to make public personnel available to other than public facilities:

(a) To the extend necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school. (Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.660 Use of private school personnel

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control. (Authority: 20 U.S.C. 1221e-3(a)(1)).

34 CFR sec 76.661 Equipment and supplies

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative

control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

34 CFR sec 76.662 Construction

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

Regulations promulgated under Title 1 of the Elementary and Secondary Education Act of 1965. Former section 45 CFR sec 116.19

(a) Each local education agency shall provide special educational services designed to meet the special

educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation.

(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a

basis comparable to that used in providing for the participation of the program by educationally deprived children enrolled in public schools.

Virginia Constitution Article 8, sec 10

State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof; exceptions to rule. No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and

towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the

citizens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district.

Virginia Statutes

Section 22.1-216 Use of public or private facilities and personnel under contract for special education

A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions or

any other public or private nonsectarian school, agency or institution approved by the Board of Education.

Section 22.1-218(A) Reimbursement of parents or guardian of handicapped children in private schools

A. If a school division is unable to provide a free appropriate public education to a handicapped child and it is not appropriately available in a state facility . . . it shall offer to place the child in . . . a nonsectarian private school for the handicapped approved by the Board of Education or such other licensing agency as may be designated by state law. . .

Section 22.1-219. Use of federal, state or local funds not restricted

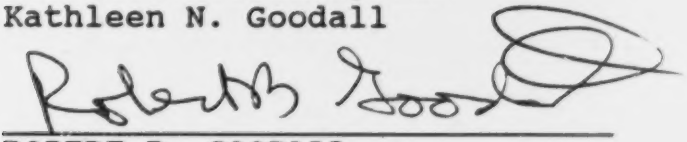
Nothing in this article shall be construed to restrict or prohibit the use of any federal, state or local funds made available under any federal, state or local appropriation or grant. (Code 1950, sec 22-10.9; 1974, c. 480; 1980, c. 559.)

Section 22.1-220. Power of counties, cities and towns to appropriate and expend funds for education of handicapped children

The governing body of any county, city or town is hereby authorized and empowered to appropriate and expend funds of the county, city or town in furtherance of the education of handicapped children residing in such county, city or town who attend . . .

public or private, nonsectarian schools, whether within or without the county, city or town and whether within or without the Commonwealth. (Code 1950, sec 22-10.10; 1974, c. 480; 1980, c. 559; 1989, c. 106.)

MATTHEW B. GOODALL, an infant
by his father and next friend,
Robert B. Goodall, and
Kathleen N. Goodall

BY: 

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FILED
AUG 9 1991
OFFICE OF THE CLERK

No. 91-163

In The

Supreme Court of the United States

October Term, 1991

MATTHEW B. GOODALL, *et al.*,

Petitioners,

v.

THE STAFFORD COUNTY SCHOOL BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did Petitioners have a right under state or federal law to have Matthew Goodall receive a cued speech interpreter at public expense where the School Board had offered to provide those services to Matthew in the public schools, but the Goodalls rejected that offer because they wanted their son to go to a pervasively religious school?

2. Does the School Board's refusal to subsidize Matthew's religious education burden the Goodalls' First Amendment rights?

3. Would the School Board violate the Establishment Clause of the First Amendment if it provided a publicly sponsored cued speech interpreter in a pervasively religious school?

4. Is the School Board's refusal to provide a publicly sponsored interpreter for Matthew in a pervasively religious school justified by a compelling state interest?

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No. 91-163

In The

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MATTHEW B. GOODALL, *et al.*,

Petitioners,

v.

THE STAFFORD COUNTY SCHOOL BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Petitioners Matthew Goodall, Robert Goodall and Kathleen Goodall ("the Goodalls") filed this action under the Education of the Handicapped Act ("EHA"), now called the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, seeking to compel the Stafford County School Board ("the School Board") to provide, at public expense, a cued speech interpreter for Matthew Goodall ("Matthew") at a private religious school, The Fredericksburg Christian School.

The district court granted summary judgment for the School Board based on four undisputed facts:

1. The School Board has offered to provide a cued speech interpreter to Matthew at a public school in Stafford County and stands ready to do so.

2. The Goodalls rejected that offer because they wanted their son to go to Fredericksburg Christian School specifically to receive religious instruction.

3. Fredericksburg Christian School is a pervasively religious school in which Bible classes are taught, Christian teachings are woven into the curriculum, and spoken prayer is taught every day.

4. A cued speech interpreter would be in the class with Matthew 100% of the time and interpret everything that was said, converting it from the spoken word into cued sign language. This would include religious teachings and prayers. (Pet. App. 87-88).

These four undisputed facts establish that the Goodalls have no right to have a publicly sponsored cued speech interpreter provided to Matthew in a pervasively religious school. Neither state nor federal law requires, or permits, provision of such services at public expense in a private school, whether religious or secular. Furthermore, the First Amendment to the United States Constitution clearly prohibits the School Board from providing a publicly sponsored interpreter in a pervasively religious school such as Fredericksburg Christian School.

This case presents no issues appropriate for review, and Respondent prays that the Petition for Writ of Certiorari be denied. The decision of the Court of Appeals does not conflict with any decision of another court, and

the issues decided in this case have been considered and dealt with in the same way by other courts.

OPINIONS AND ORDERS BELOW

Respondent accepts Petitioners' statement of the applicable opinions and orders below.

JURISDICTION

The Petitioners claim that jurisdiction lies under 28 U.S.C. § 1254. However, Petitioners have failed to identify any of the grounds for which Certiorari may be granted, as set forth in Rule 10 of the Rules of this Court.

STATEMENT OF THE CASE

As indicated by the Goodalls' Petition, there are no genuine disputes as to any material facts, particularly the four material facts mentioned above. However, because the Goodalls' description of the background of this case is somewhat confusing, the School Board restates the factual background.

The School Board provides public education services in Stafford County, Virginia, including special education and related services as required by federal and Virginia law.

Matthew Goodall is a minor and has been a resident of Stafford County since his birth. (App. 2). Robert B.

Goodall and Kathleen N. Goodall are Matthew's parents. Matthew became profoundly hearing impaired after an attack of meningitis at age 3 1/2. (*Id.* at 3). Shortly thereafter, he was identified as a handicapped child for whom special education services were appropriate. (*Id.*).

In 1980, 1981, 1982 and 1983, Individualized Educational Plans (IEPs) were prepared for Matthew, with the consultation and concurrence of Matthew's parents, calling for special education and related services to be provided at Spotswood Elementary School, a public school. (*Id.*). Matthew attended a preschool class in the regional special education program at Spotswood Elementary School along with several other deaf children. Matthew continued to participate in this program through the First Grade. (*Id.*).

In 1984, Matthew's parents voluntarily placed Matthew at The Word of Life School, a private religious school in Fredericksburg, Virginia, which he attended through the Fourth Grade. In 1986, Matthew's parents voluntarily placed Matthew in the Stafford Christian School, a private religious school in Stafford, for the Fifth and Sixth Grades. (*Id.* at 4).

In 1988, Matthew's parents decided that he should attend Fredericksburg Christian School, a private religious school, to further his religious education and development. (*Id.*). Fredericksburg Christian School is a religious school, in which Christian teachings are woven into the curriculum together with non-religious subjects. The curriculum includes Biblical education and spoken prayer as one of the daily activities. Matthew receives no

special education at Fredericksburg Christian School. (*Id.* at 5).

In the summer of 1988, the Goodalls requested that the Stafford County Public Schools again provide special education services to Matthew. An IEP meeting was held in September of 1988. The Goodalls participated in this meeting and a draft IEP was prepared. The draft IEP indicated that hearing-related services were still appropriate for Matthew and proposed to provide those services at the Drew Middle School, a Stafford County public school. (*Id.*).

Matthew's parents objected to Matthew's receiving interpretive services at Drew Middle School and asked the School Board to provide a full-time cued speech interpreter at Fredericksburg Christian School. The Goodalls wanted the School Board to provide a cued speech interpreter to be present, full-time, in Matthew's classroom at Fredericksburg Christian School. The interpreter's job would be to interpret the sounds in the classroom into physical representations that Matthew could understand. Thus, the interpreter would be present during Matthew's religious instruction and would interpret that religious instruction for Matthew's understanding. (*Id.* at 6).

The School Board denied the Goodalls' request but offered to provide a cued speech interpreter to Matthew at a public school in Stafford County (and it stands ready to do so today). The Goodalls requested a due process hearing to challenge the School Board's position. The state Hearing Officer ruled that the School Board was not responsible for providing a cued speech interpreter to Matthew, since he was unilaterally placed in a private

school by his parents for personal reasons. The Hearing Officer further held that for the School Board to provide a cued speech interpreter at Fredericksburg Christian School with public funds would violate the Establishment Clause of the First Amendment. (*Id.* at 7).

The Goodalls appealed the Hearing Officer's decision to the Virginia Department of Education. The state Review Officer's decision of September 9, 1989 affirmed the decision of the Hearing Officer, specifically holding that the requested action would violate the Establishment Clause. (*Id.* at 8).

The Goodalls filed this action on October 10, 1989, seeking an order directing the School Board to provide a cued speech interpreter for Matthew Goodall at Fredericksburg Christian School and seeking reimbursement for their costs incurred in providing such an interpreter to Matthew. The District Court dismissed their Complaint. The Court of Appeals affirmed, and the Goodalls filed their Petition with this Court.

REASONS FOR DENYING THE WRIT

Although Petitioners question the Court of Appeals' rulings on issues of state, federal, and constitutional law, the Petition does not identify any way in which this case satisfies the criteria specified in Rule 10 for review by this Court. There is no allegation that the Court of Appeals' decision is in conflict with the decision of any other court. Nor does the Petition identify any important questions of law which have not been, but which should be, settled by this Court. Instead, the Petition reveals that the Goodalls

are simply dissatisfied with the decisions reached by the state Hearing Officers, the District Court and the Court of Appeals for the Fourth Circuit. The decisions of these courts were correct and need not be reviewed by this Court.

I. THE COURT SHOULD DENY THE PETITION BECAUSE FEDERAL LAW DOES NOT REQUIRE THE SCHOOL BOARD TO PROVIDE A CUED SPEECH INTERPRETER TO MATTHEW AT A PRIVATE SCHOOL.

The IDEA gives financial assistance to participating states for the education of handicapped children. To qualify for these funds, a participating state must have in effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). *See generally Board of Educ. v. Rowley*, 458 U.S. 176, 179-84 (1981). The "free appropriate public education" required by the IDEA consists of "special education" and "related services." 20 U.S.C. § 1401(18).

The focus of the IDEA is on a "free and appropriate *public* education." Parents who unilaterally place their handicapped child in a private school despite the availability of a free appropriate public education at a public school may not demand special education and related services at the private school. *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd*, 872 F.2d 153 (6th Cir. 1989); *Work v. McKenzie*, 661 F. Supp. 225 (D.D.C. 1987). The Goodalls can point to no case supporting their position.[1]

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[1] The only reference in the IDEA to private school children is the requirement that provision of special education and

(Continued on following page)

In *Work v. McKenzie*, 661 F. Supp. 225 (D.D.C. 1987), the parents of a handicapped child unilaterally placed the child in a private school although the public school offered to provide the special education needed by the child at a public school special education facility. The parents sought to have the public school pay for the child's transportation to and from the private school, arguing that such transportation was a related service which the public school was required to provide. The court held that the public school was not required to provide such transportation:

> Once [the public school] has designated an appropriate placement, the parents have a choice. They can place the child in the public or private school designated by the [public school] or they can place the child in a private school of their own choosing without approval by [the public school]. If they elect the latter, [the public school] is not required to pay for the school, however, if the private school lacks a special education component that the child requires, for example, speech therapy, [the public school] would then be required to furnish that service and to provide transportation where necessary. This does not mean, however, that [the public school] is required to transport [the child] to and from the [private school]. . . .

(Continued from previous page)

related services for handicapped children in private schools be consistent with their number and location. 20 U.S.C. § 1413(a)(4)(B). This provision would not be required if the states were required to provide special education and related services in every private school that a handicapped child chose to attend.

> [The public school] has provided [a total special education program] by *proposing* to place the child at [the public school]. The plaintiffs, as is their right, have rejected that proposal and chosen to place the child at the [private school]. They must therefore bear the entire expense and provide the transportation to and from the [private school]. 34 C.F.R. § 300.403.

Id. at 228-29 (emphasis added).

Work v. McKenzie makes clear that the public school's obligation is satisfied if it makes an appropriate special education program available to the child, and makes available to the child the related services associated with that program. Parents cannot, by unilaterally enrolling their child in a private school, impose a duty on public schools to pay for services that are available at public schools:

> This Court does not read the regulations as requiring [the public school] to take on the added burden of transporting the child where the public school has provided an appropriate alternative.

Id. at 229.

A similar demand was rejected in *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd*, 872 F.2d 153 (6th Cir. 1989). In *McNair*, the parents also wanted transportation for their child to a private school although they had placed the child in a private school for their own personal reasons. The parents argued that the transportation was a related service to which they were entitled under the IDEA. In rejecting the plaintiffs' arguments, the court explained:

> The Regulations do not require the state to assume the cost of a private education for a handicapped child or the cost of services related to that private education which has been selected by the parents of the child for their own personal reasons, where the state has fulfilled its obligation by making its own appropriate program and related services available to those private school handicapped children.

676 F. Supp. at 1364.[2]

These cases make clear that the School Board is required to provide Matthew with special education and related services, if at all, only at the public schools. They make equally clear that, having placed Matthew in a private school for their own personal reasons, the Goodalls cannot demand that cued speech interpretation be provided to Matthew at a private school at public expense.

None of the federal regulations on which the Goodalls rely support their position. 34 C.F.R. § 300.403 provides:

> If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services *available* to the child as provided under §§ 300.450 – 300.460.

---

[2] Contrary to the Goodalls' suggestion, the Sixth Circuit did not reject this holding, but rather found it unnecessary to consider this issue because it found the transportation was not designed to meet the unique needs of the child. 872 F.2d at 157.

(emphasis added). They also rely on 34 C.F.R. § 300.452 which provides:

> Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children[3] residing in the jurisdiction of the agency.

These regulations, however, only require the School Board to make the services *available* to Matthew *at the public school*:

> The question is whether the term "provide" means that the local educational agency need only make related services available to these children should they choose to take advantage of the state's offer of a free appropriate public education, or whether it means the agency must pay for a child's related services if the child chooses to attend a private school. . . . We find that § 300.452 can only be interpreted to mean that *a local school district need not pay for a child's related services when the child's parents choose to place her in a private school.*

McNair, 676 F. Supp. at 1372 (emphasis added).

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[3] The term "private school handicapped children" is defined as "handicapped children enrolled in private schools or facilities *other than* handicapped children covered under Regs. 300.400 – 300.402." 34 C.F.R. § 300.450 (emphasis added). The handicapped children covered under §§ 300.400 – 300.402 are "handicapped children who are or have been placed in or referred to a private school or facility by a public agency. . . ." 34 C.F.R. § 300.400. Matthew Goodall was placed in Fredericksburg Christian School by his parents rather than by a public agency. Consequently, he is a "private school handicapped child."

The Goodalls also misinterpret the Education Department General Administrative Regulations (EDGAR). The Goodalls point to 34 C.F.R. § 76.654, which requires that all students who are eligible to receive program benefits must receive comparable benefits. For example, if a public school were unable to provide a special education program needed by a handicapped child, then the public school could appropriately place the child in a private school which could provide that program. The public school would be required by this regulation to devote resources to that child's program comparable to the resources devoted to the programs of children in other special education programs in the public school. This regulation, however, presupposes that the child in private school is entitled to program benefits. It does not itself create the entitlement.

The Goodalls also point to 34 C.F.R. § 76.659, which provides:

> A subgrantee may use program funds to make public personnel available in other than public facilities – (a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and (b) If those benefits are not normally provided by the private school.

This regulation also presupposes that the child in private school is entitled to program benefits. Moreover, it sets limits on the use of program funds to students in private schools, and identifies the use of those funds for private school students in permissive terms ("[a] subgrantee *may* use program funds . . . "). It does not impose any obligation upon the School Board to expend public school funds for services at a private school.

Contrary to the Goodalls' arguments, the Regulations specifically limit the School Board's obligation to provide services to a private school student. 34 C.F.R. § 76.651(a)(1) provides:

> A subgrantee shall provide students enrolled in private schools with a genuine *opportunity* for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(Emphasis added.) Thus, EDGAR requires only that Matthew receive an "opportunity" to participate in special education programs and related services under the IDEA. The School Board has fully complied with this requirement. The School Board has been and is ready to provide a cued speech interpreter to Matthew at a public school. Matthew's parents, however, have chosen to forego that opportunity by enrolling Matthew in Fredericksburg Christian School. The IDEA does not require the School Board to provide such services at whatever location Matthew or his parents may choose. *See Barnett v. Fairfax County School Bd.*, 721 F. Supp. 757, 761 (E.D. Va. 1989), *aff'd*, 927 F.2d 146 (4th Cir. 1991) ("[t]he school system is not required to duplicate the Cued Speech program for [a student] alone merely because there exists a . . . school which . . . he would rather attend."). Thus, the Court of Appeals correctly found that "by offering Matthew the services of a cued speech interpreter at Drew Middle School, the County is in full compliance with the requirements of the EHA and the regulations promulgated thereunder." (App. 28).

The Goodalls claim that statements by the U.S. Department of Education Office of Special Education Programs support their belief that Matthew is entitled to receive an interpreter at a private school. However, the opinions of the Office of Special Education Programs have consistently determined that non-public school children are entitled to only an *opportunity* to participate in public school programs.

Indeed, the Goodalls made an inquiry about this very case to the Department of Education. In the response reported at *Goodall*, 16 EHLR 1398 (1990), Dr. Judy Schrag, Director of the Office of Special Education Programs, stated:

> A limitation on the location at which some children with handicaps enrolled in private schools can be served, however, does not constitute a prohibition against the participation of these children in the special education programs carried out pursuant to the [IDEA]. . . .
>
> SEA's [state education agencies] and LEA's [local education agencies] do not necessarily have to provide services on the premises of private schools in order to meet their obligations under 20 U.S.C. § 1413(a)(4)(A). Rather, department regulations provide that students with handicaps enrolled in private schools must be provided by SEA's and LEA's "with a genuine opportunity for equitable participation" in the special education carried out by these agencies. The Department has long held that it is possible for SEA's and LEA's to provide students with handicaps enrolled in private schools with a genuine opportunity for equitable participation by serving them at a public school or neutral site.

Id. at 1399-1400 (citation and footnote omitted).

The Goodalls rely on *Aschenbrenner*, 1979 EHLR 211:110, but *Aschenbrenner* merely found that providing services on the premises of a non-public school is not *per se* impermissible. *See Aschenbrenner*, Inquiry 3, 1979 EHLR 211:111. This is significant, for example, where services are unavailable at the public school. Such, however, is not the case here. The Goodalls also point to the language of *Aschenbrenner* stating that "the 'least restrictive environment' provision would require that the services be provided to the non-public school child in his or her environment, if possible." *Aschenbrenner*, Inquiry 3, 1979 EHLR 211:111. The Goodalls, however, overlook the statement immediately following this language that "[s]ince Act 94-142 is directed at the local educational agency's obligation to *offer* the least restrictive environment, the law is not violated if the parents freely choose a non-public school environment which may not be the least restricted environment." *Aschenbrenner*, Inquiry 4, 1979 EHLR 211:111 (emphasis added). Thus, *Aschenbrenner* confirms that the School Board is only required to offer services to Matthew in the public schools.[4]

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[4] The Goodalls also cite *Los Altos School District*, 1985-86 EHLR 507:327 (Decision of Hearing Officer, California Office of Administrative Hearings). *Los Altos School District* was not the decision of a court, nor of a state agency. It was not even the decision of an administrative review officer. It was the decision of a first-level administrative hearing officer. *Los Altos School District*, moreover, is inapplicable to the Goodalls' case. *Los Altos School District* did not involve a parochial school and turned upon the fact that the services to be provided were "special education" (not "related services"). *See* 1985-86 EHLR 507:330. In contrast, the Goodalls seek "related services" in a parochial school. Consequently, reference to *Los Altos School District* here is irrelevant.

The Goodalls cite an administrative opinion from New York. In a more recent case, *Board of Educ. of the Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 527 N.E.2d 767, 531 N.Y.S.2d 889 (N.Y. 1988), the highest court of New York rejected claims similar to those of the Goodalls. The court held that there is neither a statutory nor a constitutional requirement that a public school provide private school handicapped children with services on the premises of the private schools they attend. The court explained:

> [The] contention that State and Federal statutes mandate provision of services to nonpublic school children on the premises of the [parochial] schools they normally attend requires little discussion. [T]here is no such statutory requirement. . . . This statutory claim . . . is therefore without merit.

531 N.Y.S.2d at 896. The Goodalls' authority does not support their position, but is directly to the contrary. The Court of Appeals decision was correct and the Petition should be denied.

II. THE PETITION SHOULD BE DENIED BECAUSE FEDERAL REGULATIONS PROHIBIT THE USE OF IDEA FUNDS FOR SERVICES AT A RELIGIOUS SCHOOL.

The Education Department General Administrative Regulations (EDGAR), provide:

> No state or subgrantee may use its grant or subgrant to pay for any of the following: Religious worship, instruction, or proselytization.

34 C.F.R. § 76.532(a)(1). There is no dispute in this case that Fredericksburg Christian School is a pervasively religious school. Matthew receives the teaching of Christian truth there and participates in a Bible class. The instruction Matthew would receive at Fredericksburg Christian School through a cued speech interpreter would have a religious component. Every word of religious instruction would be conveyed to Matthew through the cued speech interpreter. As found by the Hearing Officer, "When the interpreter is required for 100% attendance, he . . . is bound to interpret a certain percentage of religious teachings." (App. at 59). Section 76.532, therefore, expressly prohibits the School Board from providing a cued speech interpreter to Matthew Goodall at Fredericksburg Christian School.

III. THE PETITION SHOULD BE DENIED BECAUSE VIRGINIA LAW PROHIBITS THE USE OF PUBLIC FUNDS FOR SERVICES AT FREDERICKSBURG CHRISTIAN SCHOOL.

The IDEA expressly incorporates state educational standards. *See* 20 U.S.C. § 1413(a)(4)(B); 34 C.F.R. § 300.401(a)(3). "When a handicapped child is educated at a private school under the EHA, the State has an obligation to ensure that the school meets applicable State educational standards." *Schimmel by Schimmel v. Spillane*, 819 F.2d 477, 484 (4th Cir. 1987). The state standards for Virginia are codified at Va. Code §§ 22.1-213 through -222 and the regulations promulgated thereunder. The Virginia standards have been approved by the United States Department of Education. *Id.*

Virginia educational standards provide for special education only in nonsectarian private schools "approved by the Board of Education."

> A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions or any other public or private *nonsectarian* school, agency or institution *approved by the Board of Education*.

Va. Code § 22.1-216 (emphasis added). *See Schimmel*, 819 F.2d at 484. Because Fredericksburg Christian School has not been approved by the Board of Education (App. at 11), the School Board is neither required nor permitted to provide special education or related services at public expense at Fredericksburg Christian School.

Article VIII, § 10 of the Virginia Constitution prohibits public appropriations to sectarian schools. Va. Code § 22.1-216, § 22.1-218 and § 22.1-220 authorize aid or the provision of special education and related services only in "nonsectarian" schools, and therefore prohibit such assistance in sectarian schools.[5] *See Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); *School Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989) ("where a statute creates a right and provides a remedy for the vindication of that right, then that remedy

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[5] Under the "Dillon Rule," local government bodies in Virginia have only those powers expressly granted by the legislature or conferred by necessary implication from express powers. *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975).

is exclusive unless the statute says otherwise"); *Walker v. Temple*, 130 Va. 567, 571, 107 S.E. 720, 721 (1921).

There is no dispute in this case that Fredericksburg Christian School is a sectarian, religious school, and thus the School Board is prohibited by law from providing special education or related services there.[6]

IV. THE PETITION SHOULD BE DENIED BECAUSE THE REFUSAL TO SUBSIDIZE THE GOODALLS' RELIGIOUS BELIEFS DOES NOT RAISE A FIRST AMENDMENT QUESTION.

Because there is no requirement that the School Board provide special education and related services in a private school, secular or non-secular, when the student's parents have voluntarily placed him in that school, the Court of Appeals could have affirmed the decision of the District Court for this reason alone. If a case can be resolved on the basis of a non-constitutional issue, then

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[6] The Goodalls argue that Va. Code § 22.1-219 effectively repeals Va. Code §§ 22.1-216 and 220. Their argument ignores basic principles of statutory construction. First, as discussed above, nothing in the IDEA or federal regulations requires that special education or related services be provided in a private school, much less a religious school. Second, a statute should be interpreted in a way that gives effect to every provision of the statute. *Posey v. Commonwealth*, 123 Va. 551, 553, 96 S.E. 771 (1918). Section 219 simply makes it clear that a child should not be denied access to other federal or state programs simply because he is receiving a "free appropriate public education" under the IDEA and state statutes. The interpretation sought by the Goodalls would render meaningless the "nonsectarian" qualification in Va. Code §§ 22.1-216, 218 and 220, as well as the Constitution of Virginia.

the court must decide it on that non-constitutional basis. *See Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115, 122 (1956) ("the case must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems"); *see generally* 16 Am. Jur. 2d *Constitutional Law* §§ 160, 172 (1979).

The School Board's refusal to provide a cued speech interpreter does not prevent the Goodalls from exercising their religious beliefs. Instead, the School Board's decision merely "operates so as to make the practice of their religious beliefs more expensive" because they do not have the benefit of a government subsidy for the special education. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). However, this is a burden they have placed upon themselves, just as they have undertaken the burden of paying private school tuition. The School Board has done nothing to burden the Goodall's freedom of religion. They are entirely free to follow any religious belief they desire. They simply have no affirmative constitutional entitlement to have their religious beliefs subsidized by state or federal funds. Thus, the School Board's refusal to provide a cued speech interpreter to Matthew at public expense has inflicted no cognizable injury upon plaintiffs.

There is a basic difference between the use of expressive activity or a religious belief as a basis for discriminatorily imposing a direct regulatory burden, and the use of such content-related distinctions as a basis for determining whether to subsidize or support a particular group or activity.

For example, in *Regan v. Taxation With Representation* ("TWR"), 461 U.S. 540 (1983), this Court held that the federal government may provide a tax exemption solely for groups that lobby on behalf of veterans' interests, while denying such an exemption to other organizations devoted to activities protected by the First Amendment. The Court rejected the notion that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech." *Id.* at 548. Rather, in the benefit context, the only inquiry is whether the distinction has a rational basis; it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations." *Id.* at 550. *See also Maher v. Roe*, 432 U.S. 464, 475 (1977); and *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

This Court has "held in several contexts that a [government's] decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *TWR*, 461 U.S. at 549. Most recently, in *Rust v. Sullivan*, ___ U.S. ___, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), this Court reaffirmed that "the government has no constitutional duty to subsidize an activity merely because it is constitutionally protected, and may validly choose to allocate public funds for medical services relating to childbirth, but not to abortion. That allocation places no governmental obstacle in the path of the woman wishing to terminate her pregnancy and leaves her with the same choices as if the government had chosen not to fund family planning services at all." *Id.* 111 S. Ct. at 1763-64 [citation omitted].

It is thus well settled that a government's refusal to subsidize is not a penalty or infringement of a constitutional right. The Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of [a constitutional] freedom." *Harris v. McRae*, 448 U.S. 297 at 318 (1980). Accordingly, the Court has repeatedly rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Cammarano v. United States*, 358 U.S 498, 515 (1959) (Douglas, J., concurring). Therefore, the decision by the State of Virginia to provide IDEA funds only to nonsectarian schools does not implicate a First Amendment right. Similarly, a refusal by Stafford County School Board to provide benefits to religious schools would not implicate a First Amendment right.[7]

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[7] The cases cited by the Goodalls on this point are inapposite. In those cases, the government attempted to deny a benefit to which the plaintiffs were otherwise entitled solely on the basis of some unconnected speech or activity. Thus, for example, if the government were to withhold social security benefits to persons who sent their children to private parochial schools it would be an impermissible burden on a First Amendment right, as there is no connection between the school decision and the social security benefits. However, to refuse to provide payments related to these students' education in a private parochial school because of the religious nature of the school is not an unconstitutional burden, but is rather a refusal to subsidize based upon a legitimate relationship between the funding decision and the benefit at issue.

V. THE PETITION SHOULD BE DENIED BECAUSE THE FREE EXERCISE CLAUSE DOES NOT REQUIRE THE SCHOOL BOARD TO ASSIST MATTHEW GOODALL IN HIS RELIGIOUS STUDIES.

In any event, the alleged burden on the Goodalls' exercise of their religious belief is completely justified by the School Board's compelling interest in avoiding violation of the Establishment Clause. *See Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990); *Langlotz v. Picciano*, 683 F. Supp. 1041, 1048, 1049 (E.D. Va. 1988), *aff'd*, 905 F.2d 1530 (4th Cir. 1990) ("Plaintiff's free exercise rights . . . , if any, are clearly outweighed by the [state's] compelling interests in avoiding Establishment Clause violations . . . "; "[the state government institution] has a duty to ensure that its employees, in their roles as state employees, do not encourage or promote [religion]").[8] As explained below, the School Board would violate the Establishment Clause if it provided a cued speech interpreter to Matthew at Fredericksburg Christian School. It is well recognized that there is a compelling state interest in avoiding violation of the Establishment Clause of the First Amendment:

> The Free Exercise Clause of the First Amendment . . . does not prohibit a government from forcing a choice between receipt of a public benefit and pursuit of a religious belief if it can show a compelling reason for doing so. Avoiding a violation of the Establishment Clause that would otherwise result from an apparent

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[8] The School Board's refusal to provide the interpreter is also justified by a compelling interest in not violating the establishment clause of Va. Const. Art. I, § 16.

> endorsement of the tenets of a particular faith is ample reason for compelling that choice.

Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235, 1241-42 (2d Cir. 1986) (citations omitted).

VI. THE PETITION SHOULD BE DENIED BECAUSE THE SCHOOL BOARD WOULD VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT IF IT PROVIDED A CUED SPEECH INTERPRETER AT FREDERICKSBURG CHRISTIAN SCHOOL.

If a public school system provides personnel in a religious school, particularly where the state employee will provide instructional assistance in the religious school's classes, including religion classes, there is a clear violation of the First Amendment of the U.S. Constitution. The Goodalls can point to no court case in which a public school has been permitted to provide personnel to a religious school.

The Establishment Clause of the First Amendment prohibits governmental "establishment" of religion. More particularly, it forbids government "sponsorship, financial support, and active involvement . . . in religious activity." *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985).

This Court has established a three-part test for establishment of religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). Government action is unconstitutional if it fails any part of this test. First, the government action must have a secular purpose. Second, the action must not have the primary effect of advancing religion. Third, it must not create excessive entanglement between church and

state. *Id.*, 403 U.S. at 612-13. This three-part test is especially applicable to government action regarding the education of children. *See Grand Rapids*, 473 U.S. at 373, 384.

The government action sought by the Goodalls would violate the second and third parts of the *Lemon* test. It would impermissibly promote religion, and would excessively entangle church and state.

A. Providing a Publicly Sponsored Cued Speech Interpreter to Matthew Goodall at Fredericksburg Christian School Would Impermissibly Promote Religion.

Publicly funded programs related to education may impermissibly advance religion in three ways:

> First, the [personnel] participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs.
>
> Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school.
>
> Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

Grand Rapids, 473 U.S. at 385. The government assistance sought by the Goodalls would impermissibly advance religion in all these ways.

First, a cued speech interpreter at Fredericksburg Christian School would participate in the inculcation of religious tenets or beliefs. Fredericksburg Christian School is a religious school that teaches Bible study and incorporates Christian teachings into its classes. The school's academic objective is "To help students appreciate God's Word as their most basic 'life textbook.' " The interpreter would communicate to Matthew all the religious messages propounded by Matthew's teachers. Therefore, the School Board would unconstitutionally finance religious indoctrination. *See Meek v. Pittenger*, 421 U.S. 349, 370-72 (1975); *Grand Rapids*, 473 U.S. at 386-88.

Second, a publicly funded cued speech interpreter working at Fredericksburg Christian School would create student perceptions of a symbolic link between government and religion. Students would see the state providing help in communicating religious messages to Matthew, and would perceive that the state endorses Fredericksburg Christian School's religious teachings. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Grand Rapids*, 473 U.S. at 389-90. The creation of this perception would violate the Establishment Clause.

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any – or all – religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement . . . of religion, a core purpose of the Establishment Clause is violated.

Id. at 389.

Third, the School Board would in effect provide a "direct and substantial" subsidy to the primary religious mission of Fredericksburg Christian School by providing a cued speech interpreter at that school. *See Grand Rapids*, 473 U.S. at 392-97. "Even though earmarked for secular purposes, when [state aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible primary effect of advancing religion." *Meek*, 421 U.S. at 365-66; *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (government aid flowing to a pervasively sectarian school has the primary effect of advancing religion); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . "). Moreover, since the Fredericksburg Christian School is a religious school, this effect would be impermissible even if the subsidy were "indirect and incidental." *See Grand Rapids*, 473 U.S. at 394 n.12.

The United States District Court for Arizona has recently held that sign language interpretation demanded for James Zobrest, a student at Salpointe Catholic High School, would impermissibly advance religion in violation of the Establishment Clause. *See Zobrest v. Catalina Foothills*, 1988-89 EHLR 441:564 (D. Ariz., July 19, 1989).

B. Providing a Publicly Sponsored Cued Speech Interpreter to Matthew Goodall at Fredericksburg Christian School Would Involve Excessive Entanglement Between Church and State.

If state aid is provided to personnel in a religious school, then "[t]he State must be *certain*, given the Religion Clauses, that subsidized [personnel] do not inculcate religion. . . . " *Lemon*, 403 U.S. at 619 (emphasis added). "[A] diminished probability of impermissible conduct is not sufficient. . . . " *Meek*, 421 U.S. at 371.

To insure that aid does not promote religion, however, the state generally must impermissibly entangle itself in the affairs of the religious school. This is particularly true where, as here, the aid is in the form of personnel. For example, in *Lemon* this Court observed:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that [the restrictions] are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 619. Similarly, in *Meek*, the Court found:

> To be certain that [personnel] remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of [the personnel] and then engage in some

> form of continuing surveillance to ensure that those restrictions were being followed.

Meek, 421 U.S. at 372. And in *Aguilar v. Felton* the Court found:

> The critical elements of the entanglement proscribed in *Lemon* and *Meek* are . . . present in this case. First, . . . the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of [personnel], ongoing inspection is required to ensure the absence of a religious message.

Aguilar v. Felton, 473 U.S. 402, 412 (1985).

The "critical elements" identified in *Aguilar* are also presented in the instant case. Publicly funded assistance would be provided to Matthew in a sectarian environment, Fredericksburg Christian School. Ongoing monitoring of the cued speech interpreter's communication to Matthew would be necessary. The state would therefore be required to excessively entangle itself in Fredericksburg Christian School. That state presence would, in fact, be required under state regulations. Those regulations provide that special education and related services must be provided "under public supervision and direction." Special Ed. Regs. at p. 28. Those regulations further provide: "Each LEA providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services." *Id.* at p. 44. In addition, public employees of the School Board would be required to visit Matthew's classes to monitor the interpreter's performance, just as they monitor the performance of its other teachers and aids.

As was true of the services in *Aguilar*, providing an interpreter to Matthew at a religious school "would require a permanent and pervasive state presence" there. *Aguilar*, 473 U.S. at 413. The necessary monitoring by public authorities in Fredericksburg Christian School would be pervasive and would infringe "precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Id.*[9]

CONCLUSION

The issues presented by the Petitioners involve neither a substantial federal question nor a split among the circuits. Therefore, Respondent prays that Certiorari be denied.

Respectfully submitted,

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[9] This is particularly true after the enactment of the Civil Rights Restoration Act of 1987, P.L. 100-259, 20 U.S.C. § 1681, *et seq.*, which would make Fredericksburg Christian School subject to extensive federal regulations upon the receipt of federal/state funds.